

INTRODUCTION.

THE close of the last, and the beginning of the present, century witnessed remarkable developments of ideas and institutions.

The American Revolution was the first attempt in the history of the world to embody, in a written constitution for a great country, the fundamental principles of government, and to distribute its powers among the different departments.

The French Revolution followed. Passion and prejudice, and the absence of a controlling religious sentiment, marred its work, and prepared the absolute government in which the Nation sought refuge from its own excesses. But the Revolution was born of reform, and the spirit of reform did not cease to work in the councils of the state, when popular government, perishing of misrule and anarchy, gave way to the Consulate.

The French Code was the product of discussions begun amidst civil throes, and brought to a close under the auspices of the First Consul.

Never, except in one instance, had the law of a great State been so completely re-organized. The Code of Justinian served as the model and inspiration of the Code of Napoleon. The former preserved the rules which the wisdom of past ages had sanctioned; pruned what had become obsolete or incongruous; out of chaotic confusion evoked system and order; and added the regulations which experience had proved to be necessary, or prudent forethought recommended as useful. The latter followed the illustrious example.

The names of Trouchet, Cambacérès, Le Brun, and their fellow-members of the Napoleonic Commission, will ever be connected in honour and memory with those of Tribonian and his associates in the Commission organized by Justinian.

Both Codes have exerted wide and permanent influence upon the condition of mankind. The Civil Law, embodied in the Code of Justinian, has entered largely into the legislation of modern Europe and America; while the Code of Napoleon survives the First and the Second Empires as the law of France; has been adopted, in the main, by several neighbouring States; and has given an impulse to improvement and order in Jurisprudence which cannot be measured.

The impulse was felt in America by Edward Livingston, a learned lawyer, familiar with the theory and practice of Common and Civil Law, and thoroughly versed in the general principles of Jurisprudence; a statesman already eminent, and destined to be much more eminent; he was singularly qualified for the task which, in obedience to the Legislature of Louisiana, he undertook, of preparing a system of Penal Law for the State of his adoption.

This system consists of a Code of Crimes and Punishments; a Code of Procedure; a Code of Evidence; a Code of Reform and Prison Discipline; and a Book of Definitions.

To each of the four Codes an elaborate Report was prefixed, in which its principles, purposes, and provisions were fully expounded. Two elaborate preliminary Reports, one on the plan of a Penal Code, and one on the system of Penal Law, preceded these. The whole work required the continuous and indefatigable labours of three years.

When completed, an untoward accident occurred which would have paralyzed the efforts of a man less patient in labour, and less firm of purpose. In one night the original draught, and the copy carefully prepared for the printer, was destroyed by fire. The next morning witnessed the resumption of his toils, and in two years the work was again complete.

It did not receive the sanction of the Legislature necessary to make it the law of the State. It was not to be the good fortune of Louisiana to possess a Penal Code so far in advance of any system hitherto promulgated. Objections of detail and fears of possible consequences, combined with sluggish indifference, and the inert force always so difficult to be overcome in deliberative assemblies, to prevent the adoption of the comprehensive system, planned with a genius only equalled by the indefatigable labour with which the outlines were filled and completed. The Legislature proved unequal to the adoption of the Code of Livingston.

It might have been otherwise had its author remained in Louisiana, and devoted his great personal influence to the work of securing the necessary sanction.

But the labour of preparing the Codes had been chiefly performed elsewhere, and in connection with the discharge of other public duties ; and the Legislature, though failing to adopt his system, manifested its appreciation of its author by electing him soon after as Senator of the United States, from which position he was transferred to the Cabinet of Jackson, and then made Minister to France. He never returned to Louisiana.

But though the State for which the Codes were prepared neglected to avail itself of the labours assigned and solicited by itself, they have proved, together with their Introductions, a treasure of suggestions to which many States are indebted for useful legislation ; and one in particular, the Republic of Guatemala, for certain portions adopted into her own laws.

And the most advanced thinkers of the age, among whom must be mentioned the illustrious names of Bentham and Jefferson, made haste to acknowledge its merits, and to "arrange," to use the words of Jefferson, the name of its author with those of the "Sages of Antiquity."

It should be mentioned here that soon after the completion of the Codes for Louisiana, Livingston, then a representative in Congress from that State, prepared and presented to the House a system of Penal Law, adapted to the use of the General Government, and embracing a title on "Offences against the Laws of Nations." This was printed by order of the House in 1828, but was followed by no legislation.

A complete edition of the Codes and Introductory Reports was printed at Philadelphia in 1833. The most important portions had been previously printed in England, France, and Germany. The whole is now nearly out of print. But the interest in the subject lives, and will live, as long as the Punishment of Crime and the Reformation of Criminals continue to engage the attention of legislators and philanthropists.

It is not surprising, then, that the work of Mr. Livingston should attract again the public attention. An edition, consisting of the Introductory Reports and the title on Offences against the Laws of Nations, from the system prepared for the United States, was begun in Paris just before

the breaking out of the recent Franco-German war, and will speedily appear.

And it seems not unfit, in view of the approaching international Congress on the Prevention and Repression of Crime, including Penal and Reformatory Treatment, that an American edition of the whole work, treating with such remarkable ability the leading topics which must engage its attention, should be brought out under the auspices of the American Prison Association. Funds for the purpose have been generously furnished to the Association; and it rejoices in the opportunity thus afforded of reviving in the memories of philanthropists and statesmen the lessons of wisdom and humanity which it contains.

The American edition will thus meet the French edition of the work of the great American Jurist, who was chosen on account of it an Associate of the French Academy of Moral and Political Science, nearly half a century ago. The fact will be certainly remarkable. It will prove that, if Livingston was in advance of his times, the day is at least approaching when his broad and comprehensive views will be not only appreciated but realized.

The American Prison Association, counting as its chief objects the reform of Criminal Codes, the improvement of prison discipline, and the study and application of the best means of saving discharged prisoners from a return to crime, takes great satisfaction in reproducing a work in which all these topics are discussed with a keenness of insight, a clearness of statement, a force of logic, a beauty of diction, an elevation of sentiment, and a breadth of sympathy, which mark at once the highest genius and largest benevolence.

WASHINGTON, May, 1872.

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AN ACT

OF

THE GENERAL ASSEMBLY OF LOUISIANA,

RELATIVE TO

THE CRIMINAL LAWS OF THAT STATE.

APPROVED 10 FEBRUARY 1820.

WHEREAS it is of primary importance, in every well regulated state, that the code of criminal law should be founded on one principle, viz., the prevention of crime, that all offences should be clearly and explicitly defined, in language generally understood; that punishments should be proportioned to offences; that the rules of evidence should be ascertained as applicable to each offence; that the mode of procedure should be simple, and the duty of magistrates, executive officers and individuals assisting them, should be pointed out by law: and whereas the system of criminal law, by which this state is now governed, is defective in many, or all of the points above enumerated, therefore:

Section 1. Be it enacted by the senate and house of representatives of the state of Louisiana in general assembly convened, that a person learned in the law, shall be appointed by the senate and house of representatives at this session, whose duty it shall be to prepare and present to the next general assembly, for its consideration, a code of criminal law in both the French and English languages, designating all criminal offences

punishable by law ; defining the same in clear and explicit terms ; designating the punishment to be inflicted on each ; laying down the rules of evidence on trials ; directing the whole mode of procedure, and pointing out the duties of the judicial and executive officers in the performance of their functions under it.

Section 2. And be it further enacted, that the person so to be chosen, shall receive for his services such compensation as shall be determined by the general assembly, at their next session, and that a sum of five hundred dollars shall be paid to him, on a warrant of the governor upon the state treasury, to enable him to procure such information and documents relative to the operation of the improvements in criminal jurisprudence, particularly of the penitentiary system in the different states, as he may deem useful to report to the general assembly in considering the project of a code : he shall account to the general assembly, in what manner the said five hundred dollars has been disposed of.

RESOLUTIONS

OF

THE GENERAL ASSEMBLY OF LOUISIANA.

21 MARCH 1822.

RESOLVED by the senate and house of representatives in general assembly convened, that the general assembly do approve of the plan proposed by Edward Livingston, Esq., in his report, made in pursuance of the act entitled "an act relative to the criminal laws of this state," and earnestly solicit Mr. Livingston to prosecute this work, according to said report; that two thousand copies of the same, together with the part of the projected code thereto annexed, be printed in pamphlet form; one thousand of which shall be printed in French and one thousand in English, under the direction of the said Edward Livingston, Esq., of which five copies be delivered to each member of the present general assembly, fifty copies to the governor, one copy to each of the judges of the supreme court, the district judges, the judge of the criminal court, the attorney-general and district attorneys, the parish judges, two hundred copies to the said Edward Livingston, Esq.; and that the balance shall be for the use of the state, of which one half shall be deposited in the hands of the secretary of the senate and clerk of the house of representatives, and the other half in the office of the secretary of the state.

And be it further resolved, that the governor be requested, and it is hereby made his duty to contract for the printing of said work, and to pay for the same out of the contingent fund.

And be it further resolved, that a sum of one thousand

dollars be paid to Edward Livingston, Esq., on his warrant, out of the treasury of the state, to be on account of the compensation to him allowed, when his work shall be completed.

A. BEAUVAIS,
Speaker of the House of Representatives.

J. POYDRAS,
President of the Senate.

Approved, March 21, 1822,

T. B. ROBERTSON,
Governor of the State of Louisiana.

IN

THE GENERAL ASSEMBLY OF LOUISIANA.

13 FEBRUARY 1821.

WE, the undersigned, secretary of the senate and clerk of the house of representatives of the state of Louisiana, do hereby certify, that on the thirteenth of February in the year of our Lord, one thousand eight hundred and twenty-one, EDWARD LIVINGSTON, Esq., was elected and appointed by the joint ballot of the general assembly of said state, to draw and prepare a criminal code. In testimony whereof, we have hereunto set our hands.

J. CHABAUD,
Secretary of the Senate.

CANONGE,
Clerk of the House of Representatives.

New Orleans, March 28, 1822.

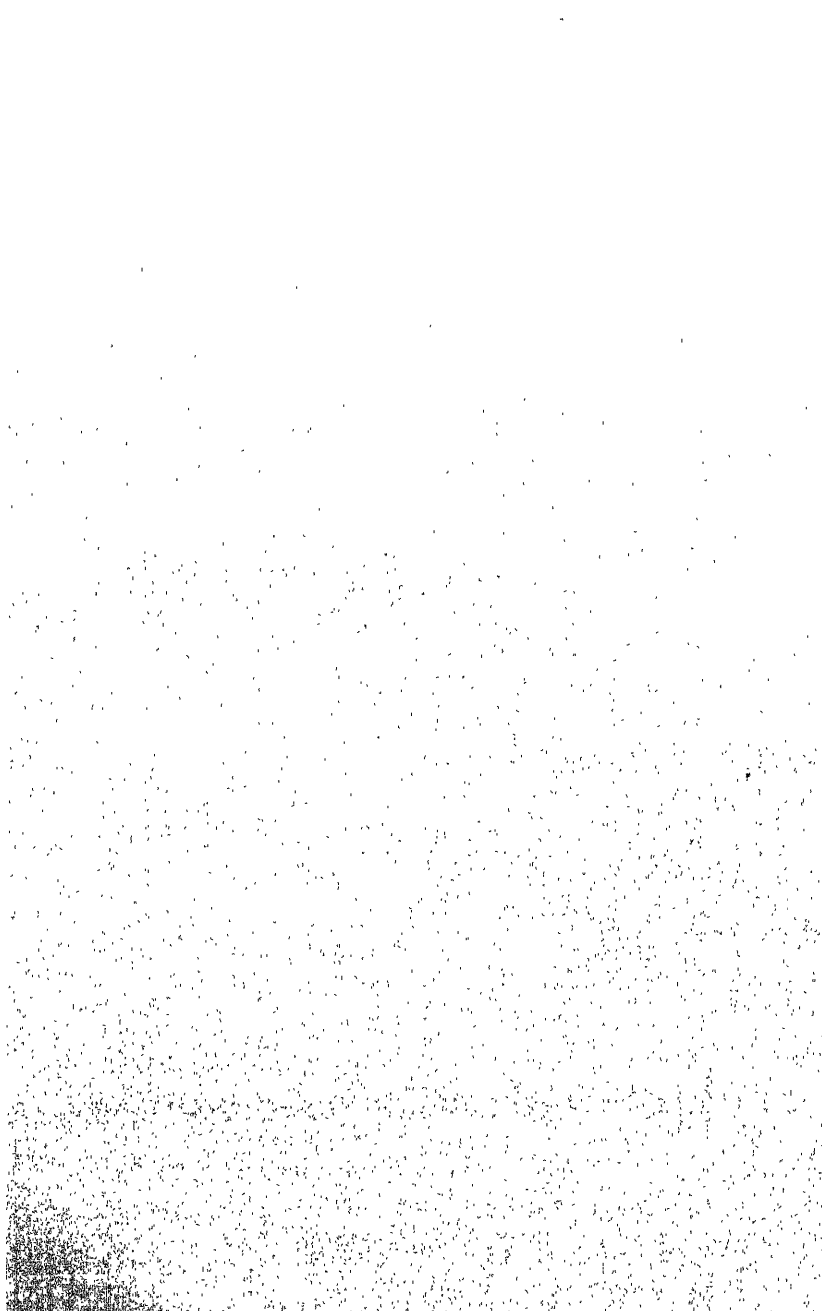
REPORT

MADE BY

EDWARD LIVINGSTON

TO

THE HONOURABLE THE SENATE AND HOUSE OF
REPRESENTATIVES OF THE STATE OF LOUISIANA
IN GENERAL ASSEMBLY CONVENED.



REPORT

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TO

THE HONOURABLE THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA IN GENERAL ASSEMBLY CONVENED.

In pursuance of the Act entitled "An Act relative to the Criminal Laws of that State."

HAVING been honoured by an appointment at the last session, to perform the duties required by "an act relative to the criminal laws of the state," I have thought it necessary to report to the general assembly the progress that has been made in the work, and the reasons which have prevented its completion. In undertaking those duties, I relied much on the aid which I expected to derive from the other states; for, although none of them has framed a code on so comprehensive a plan as that contemplated by our law, yet most of them have established the penitentiary system, which is intended to form the basis of our legislation on this subject. Before I could avail myself of the advantage which those experiments afforded, it was necessary to know, with precision, their results. This information could only be obtained by collecting the returns and official reports of the different establishments, and inducing men of eminence and abilities to communicate their observations on the subject. Knowing also the advantage to be derived from a comparison of the opinions of eminent jurists and statesmen on other leading principles,

which must be embodied in the system, I addressed several copies of the annexed circular letter to the governors of each state, with the request, that they might be put into the hands of men, from whom the desired information might be expected; these, as well as a number of similar applications, I did hope, would have procured a body of information useful not only to me in framing the work, but to the legislature in judging of it.

This hope has, however, as yet been but partially realized. I have received returns of the state of the penitentiary only from Massachusetts. Governor Wollcott and Judge Swift, of Connecticut, Chancellor Kent, of New York, Judge Holman, of Ohio, Mr. Rawle, of Pennsylvania, Mr. Bowen, of Rhode Island, Mr. Brice, of Maryland, and Colonel Johnson, of Kentucky, have communicated to me some useful information; with these exceptions, the gentlemen to whom my letters were addressed, have been too much occupied in their own states to attend to the affairs of ours.

Our minister in England has had the goodness to send to me the reports of the committees of the house of commons, appointed to inquire into the propriety of a revision of their penal laws; documents of great utility, to show the operation of the law we have partially adopted, in that country from which we have borrowed it.

It appears that these reports are not easily procured, and that Mr. Rush was indebted for them to Mr. Jeremy Bentham, whose writings have thrown so much light on the subject of criminal legislation, and who, in a note addressed to Mr. Rush, on our undertaking, has made a suggestion which he will find has not been disregarded.

I certainly lost some time in waiting for answers to my letters, but I cannot, in candour, state this (even with the necessary attention to my professional business), to have been the only cause why the task I have undertaken is not yet fully performed.

I never so far overrated my own powers, as to suppose that the whole plan would be executed in the short interval between the two sessions, but I did think that

parts of it might be prepared, and submitted for the sanction of the present legislature, leaving the others to be acted upon at a future period. A closer view of the subject, however, convinced me of my error. In establishing the principles on which the work was to be framed, and tracing the plan of its different divisions, I found that its parts were so closely connected, and that continued references from one to the other were so unavoidable, as to render it difficult fairly to judge of, or decide on, any part without examining the whole. I therefore determined to report to the general assembly, the progress I had made, to develop the plan on which I proposed to execute the work, to give them some of the detached parts as specimens of the execution, and then to take their direction whether it should be completed or not.

The introductory notice herewith submitted, gives the different divisions of the code, into books, chapters and sections ; the whole is sub-divided into articles, numbered progressively through each book, so that citations may be made by referring to the article and book only. A continued numeration of the articles, through the whole work, has been found, in other instances, inconvenient, and carrying the numbers through each chapter or section only, increases the difficulty of reference. In the same notice, will be found some general provisions, made to obviate the necessity of those repetitions, which increased the barbarism of our legal language ; but the omission of which has sometimes counteracted the intent of the legislature. The instance of two statutes, which were made in England, to punish, the one the stealing of *horses*, and the other the stealing of a *horse*, is familiar to lawyers ; and indeed it has been doubted by some, whether a third statute were not necessary, to include the female part of the species.

One other article in this notice points to a method, which will also, it is supposed, tend to render the code both explicit and concise. Technical terms are never used in the work, where common expressions could be found

to give the same idea. The employment of them, however, is, in many instances, unavoidable. In all such cases, and whenever a word, or a phrase, is either ambiguous, or employed in any other sense than that which is given to it in common parlance, it becomes necessary to explain the precise meaning which is attached to it in the code. To this end, whenever any such expressions occur in the course of the work, they are to be printed in a particular character, which will serve as a notice, that they are defined and explained. These definitions and explanations form the first book.

This, though necessarily the first in numerical order, it is obvious, must be the last executed. The words requiring explanation are noted, and the definitions written, as the work progresses; when complete, it will be submitted to men versed in the language of the law, and every word not fully understood by them, will be marked for explanation. The foregoing parts of the plan are believed to be new, and therefore require the stricter attention to the propriety of their enactment. They suggested themselves to me, as the means of making the work, at once concise, and easily comprehended by those who are most interested in understanding it.

The second book begins with a preamble, which states the reasons that called for the enactment of a criminal code, and which sanctions, by a solemn legislative declaration, the principles on which its several provisions are founded. Those principles once studied, and after proper discussion adopted, will serve as a standard to measure the propriety of every other part of the code: with these rules constantly before us, and duly impressed on our minds, we can proceed with confidence and comparative ease, to the task of penal legislation; and we may see at a glance, or determine by a single thought, whether any proposed provision is consonant to those maxims which we have adopted as the dictates of truth. The incongruities which have pervaded our system will disappear; every new enactment will be impressed with the character of ~~the~~ original body of laws; and our penal legislation will

no longer be a piece of fretwork exhibiting the passions of its several authors, their fears, their caprices, or the carelessness and inattention with which legislators in all ages and in every country have, at times, endangered the lives, the liberties, and fortunes of the people, by inconsistent provisions, cruel or disproportioned punishments, and a legislation, weak and wavering, because guided by no principle, or by one that was continually changing, and therefore could seldom be right. This division of the code is deemed to be of the highest importance; all the other parts will derive their character from this; it is the foundation of the whole work, and, if well laid, the superstructure raised in conformity to it cannot be essentially faulty. It is the result of much reflection, guided by an anxiety to discover the truth, and to express it with precision.

The remainder of the second book is devoted to the establishment of general dispositions, applicable to the exercise of legislative power in penal jurisprudence; to prosecutions and trials; to a designation of the persons who are amenable to the provisions of this code; to a statement of the circumstances under which acts, that would otherwise be offences, may be justified or excused; to the repetition of offences; to the situation of different persons participating in the same offence, as principals, accomplices or accessories.

The enunciation of these general provisions, it is supposed, will greatly tend, not only to elucidate, but abridge the work; by throwing them into a single chapter, memory is assisted, order is better preserved, and repetition very much avoided. Among those which relate to the exercise of legislative power, are some that ought particularly to fix the attention of the general assembly; such is one for the exclusion of that class of offences, which figures in the English, and most other penal codes, under the vague description of offences against the laws of morality, of nature, and of religion. The will of the legislature is established as the only rule; and the crude and varying opinions of judges, as to the extent of this uncertain code of good morals, are no longer to usurp the

authority of law. Connected with this, is the provision which prohibits the punishment of any act not expressly forbidden by the letter of the law, under the pretence that it comes within its spirit.

By the criminal laws which now govern us, most offences are described in the technical words of the English jurisprudence, and we are referred to it for their explanation; hence our judges have deemed themselves bound to adopt those definitions which have been given by the English courts, and the whole train of constructive offences has been brought into our law. The institution of the trial by jury, the rare infliction of torture, and in latter times, the law of *habeas corpus*, gave a decided superiority to the penal law of England over that of its neighbours. The nation, unfortunately, mistook this superiority for perfection; and while they proudly looked down on the rest of Europe, and reproached them with their tortures, their inquisitions, and secret tribunals, they shut their eyes to the imperfections of their own code. Prisoners were denied the assistance of counsel; men were executed because they could not read, those who refused to answer, were condemned to die under the most cruel torture. Executions for some crimes were attended with butchery that would disgust a savage. The life and honour of the accused were made to depend on the uncertain issue of a judicial combat. A wretched sophistry introduced the doctrine of corrupted blood. Heretics and witches were committed to the flames. No proportion was preserved between crimes and punishments. The cutting of a twig, and the assassination of a parent; breaking a fish-pond, and poisoning a whole family or murdering them in their sleep, all incurred the same penalties; and two hundred different actions, many not deserving the name of offences, were punishable by death. This dreadful list was increased by the legislation of the judges, who declared acts which were not criminal under the letter of the law, to be punishable by virtue of its spirit. The statute gave the text, and the tribunals wrote the commentary in letters of blood; and extended its penalties

by the creation of constructive offences. The vague, and sometimes unintelligible language, employed in the penal statutes; and the discordant opinions of elementary writers, gave a colour of necessity to this assumption of power, and the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies; quartered for constructive treasons, and roasted alive for constructive heresies, with a patience that would be astonishing, even if their written laws had sanctioned the butchery. The first constructive extension of a penal statute beyond its letter, is an *ex post facto* law, as regards the offence to which it is applied, and is an illegal assumption of legislative power, so far as it establishes a rule for future decisions. In our republic, where the different departments of government are constitutionally forbidden to interfere with each other's functions, the exercise of this power would be particularly dangerous; it was therefore thought proper to forbid it by an express prohibition. Some actions, injurious to society, may, by this means, be permitted for a time, but it was deemed infinitely better to submit to this temporary inconvenience, than to allow the exercise of a power so much at war with the principles of our government. It may be proper to observe, that the fear of these consequences is not ideal, and that the decisions of all tribunals, under the common law, justify the belief, that without some legislative restraint, our courts would not be more scrupulous than those of other countries, in sanctioning this dangerous abuse. In another part of the code, it is intended to insert a provision, to bring before the legislature, at stated periods, all those cases in which the operation of the law is supposed to fall short of, or to extend beyond, the intention of those who framed it; the defects, if really such, will then be cured by the power legally authorized to apply the remedy; the harmony of our constitutional distribution of powers will be undisturbed; and the ends of public justice attained with greater regularity and better effect.

Our constitution, containing a very imperfect declaration of rights, leaves the legislative power entirely uncontrolled in some points, where restraint has, in most free governments, been deemed essential; a majority may establish their religion as that of the state; non-conformity may be punished as heresy, and even the toleration of other errors may be refused; without violating any express constitutional law. Corruption of blood may be established, and it is even somewhat doubtful, whether, strictly speaking, it does not, under the general terms in which the rules of the common law are adopted, now exist. No legislative act can apply an effectual remedy to these and other constitutional defects; but their existence has called for a longer enunciation of general principles in the code, than would otherwise have been necessary. Our successors will not be bound to observe them, but we shall vince our own conviction of their truth; and by impressing them on the minds of our constituents, render any attempt to undermine or destroy them, more difficult and more odious. Acknowledged truths in politics and jurisprudence, can never be too often repeated. When the true principles of legislation are impressed on the minds of the people; when they see the reasons of the laws by which they are governed, they will obey them with cheerfulness, if just, and know how to change them, if oppressive. The reporter, therefore, has thought it an essential part of his duty to fortify the precepts of the projected code, by assigning the reasons on which they are founded; thus to open the arcana of penal legislation, and to show that the mystery in which it has hitherto been involved, was not inherent in the subject, but must disappear, whenever its true principles are developed.

Among the general provisions, is also found one, asserting the right to publish, without restraint, the account of all proceedings in criminal courts, and freely to discuss the conduct of judges, and other officers employed in administering justice. That this may be done more effectually, it is provided that the judge shall, at

the request either of the accused or of the prosecutor, state and record his decisions, with the reasons on which they are founded. In a subsequent part of the work, it will be made the duty of a particular officer to publish accurate accounts of all trials, remarkable either for the atrocity of the offence, or the importance of the principles decided in the course of the proceeding. Publicity is an object of such importance in free governments, that it not only ought to be permitted, but must be secured by a species of compulsion. The people must be forced to know what their servants are doing, or they will, like other masters, submit to imposition, rather than take the trouble of inquiring into the state of their affairs. No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured. In modern times, the press is so powerful an engine to effect this, that the nation which neglects to employ it, in promulgating the operations of every department in government, can neither know nor deserve the blessings of freedom. The important task of spreading this kind of information, ought not, therefore, be left to the chance of private exertion; it must be made a public duty; every one employed in the administration of justice will then act under the conviction, that his official conduct and opinions will be discussed before a tribunal in which he neither presides nor officiates. The effects of such a conviction may be easily imagined, and we may fairly conclude, that in proportion to its strength, will be the fidelity and diligence of those upon whom it operates.

By our constitution the right of a trial by jury is secured to the accused, but it is not exclusively established. This, however, may be done by law, and there are so many strong reasons in its favour, that it has been thought proper to insert in the code, a precise declaration, that in all criminal prosecutions, the trial by jury is

a privilege which cannot be renounced. Were it left entirely at the option of the accused, a desire to propitiate the favour of the judge, ignorance of his true interest, or the confusion incident to his situation, might induce him to waive the advantage of a trial by his country, and thus, by degrees, accustom the people to a spectacle they ought never to behold; a single man determining the fact, applying the law, and disposing at his will, of the life, liberty, and reputation of a citizen.

In proposing this change in our law, I may be permitted to make a few reflections, to show its importance. The trial by jury formed no part of the jurisprudence of the different powers which governed Louisiana prior to its last cession. It was first introduced when the province became incorporated with the United States, as one of its territories. By the first act for effecting this union, the trial by jury was established in capital cases; and in all others, both civil and criminal, was left, as in all cases it is now, optional with the parties. In the second grade of government, it was provided, that the people should have the benefit of the trial by jury, but it was not declared the only mode of trial; and our state constitution has adopted it in original cases, nearly in the same words. This indifference in our constitutional compacts, to an institution of such vital importance, has had the most injurious consequences, which have been increased by subsequent provisions. In civil cases, it is already banished from our courts, or used only as an engine of delay, or as an awkward and oppressive vehicle for transmitting testimony, to be decided only by the supreme court. This degradation of the functions of jurors, in cases of property, certainly does not tend to render them respectable in cases affecting life and liberty. In criminal cases, the attorney-general, I believe, demands a trial by jury, as he has a right to do, in all serious cases even where the accused is willing to waive it. But a prosecutor less friendly to the institution, and a judge more desirous to increase his powers than the gentlemen who now fill those stations, could easily find means to

make the jury as useless, as rarely employed, and as insignificant in a criminal court, as our laws have already made it in civil jurisdiction.

Those who advocate the present disposition of our law, say—admitting the trial by jury to be an advantage, the law does enough when it gives the accused the option to avail himself of its benefits ; he is the best judge whether it will be useful to him ; and it would be unjust to direct him in so important a choice. This argument is specious, but not solid. There are reasons, and some have already been stated, to show that this option, in many cases, cannot be freely exercised. There is, moreover, another interest, besides that of the culprit, to be considered ; if he be guilty, the state has an interest in his conviction ; and whether guilty or innocent, it has a higher interest, that the fact should be fairly canvassed before judges inaccessible to influence, and unbiassed by any false views of official duty. It has an interest in the character of its administration of justice, and a paramount duty to perform, in rendering it free from suspicion. It is not true, therefore, to say, that the laws do enough, when they give the choice (even supposing it could be made with deliberation) between a fair and impartial trial, and one that is liable to the strongest objections. They must do more, they must restrict that choice, so as not to suffer an ill-advised individual to degrade them into instruments of ruin, though it should be voluntarily inflicted ; or of death, though that death should be suicide.

Another advantage of rendering this mode of trial obligatory is, that it diffuses the most valuable information among every rank of citizens ; it is a school, of which every jury that is impanelled, is a separate class ; where the dictates of the laws, and the consequences of disobedience to them, are practically taught. The frequent exercise of these important functions, moreover, gives a sense of dignity and self-respect, not only becoming the character of a free citizen, but which adds to his private happiness. Neither party spirit, nor

intrigue, nor power, can deprive him of this share in the administration of justice, though they can humble the pride of every other office, and vacate every other place. Every time he is called to act in this capacity, he must feel that though perhaps placed in the humblest station, he is yet the guardian of the life, the liberty, and reputation of his fellow citizens, against injustice and oppression; and that, while his plain understanding has been found the best refuge for innocence, his incorruptible integrity is pronounced a sure pledge that guilt will not escape. A state whose most obscure citizens are thus individually elevated to perform those august functions: who are, alternately, the defenders of the injured, the deciders of the guilty, the vigilant guardians of the constitution; without whose consent no punishment can be inflicted, no disgrace incurred; who can, by their voice, arrest the blow of oppression, and direct the hand of justice when to strike—such a state can never sink into slavery, or easily submit to oppression; corrupt rulers may pervert the constitution; ambitious demagogues may violate its precepts; foreign influence may control its operations; but while the people enjoy the trial by jury, taken by lot from among themselves, they cannot cease to be free. The information it spreads; the sense of dignity and independence it inspires; the courage it creates, will always give them an energy of resistance, that can grapple with encroachment; and a renovating spirit, that will make arbitrary power despair. The enemies of freedom know this; they know how admirable a vehicle it is to convey the contagion of those liberal principles, which attack the vitals of their power, and they guard against its introduction with more care than they would take to avoid pestilential disease. In countries where it already exists, they insidiously endeavour to innovate, because they dare not openly destroy; changes inconsistent with the spirit of the institution are introduced, under the plausible pretext of improvement; the common sense of citizens are too ill-informed to perform the duties of jurors—a selection is necessary. This choice must be

confided to an agent of executive power, and must be made among the most eminent for education, wealth and respectability; so that, after several successive operations of political chemistry, a shining result may be obtained, freed, indeed, from all republican dross, but without any of the intrinsic value that is found in the rugged, but inflexible integrity and incorruptible worth of the original composition. Men, inpanelled by this process, bear no resemblance but in name to the sturdy, honest, unlettered jurors, who derive no dignity but from the performance of their duties; and the momentary exercise of whose functions gives no time for the work of corruption, or the effect of influence or fear. By innovations such as these, the institution is so changed, as to leave nothing to attach the affections, or awaken the interest of the people, and it is neglected as an useless, or abandoned as a mischievous contrivance.

In England, the panel is made up by an officer of the crown; but there are many correctives which lessen the effect of this vice. The return, except in very special cases, is made, not with a view to any particular cause, but for the trial of all that are at issue; and out of a large number returned on the panel, the twelve taken for the trial are designated by lot; in capital cases, also, the extent to which challenges are allowed, is calculated to defeat any improper practices; and when we add to this the general veneration for this mode of trial, the force of public opinion, guided by a spirit which it has created, and diffused, and perpetuated, we shall see the reason why the trial by jury, though by no means perfectly organized, is, in that country, justly considered as the best security for the liberties of the people; and why, though they behold with a shameful indifference, a domineering aristocracy, corrupting their legislative, and encroaching on their executive branches of government, they yet boast, with reason, of the independence of their judiciary, ennobled as it is with the trial by jury. We have received this invaluable inheritance from our British ancestors: let us defend, and improve, and

perpetuate it; not only that we may owe to its advantages, but, that if this with the principle of its representation in government and the principle of its convenience for securing personal liberty, should chance to be contravened, that we should not be left without a country from whence we derived the necessary example of the obligation we have received by our ancestors to perpetuate a regenerated state, those obligations, those principles established by ancestors common to the country of freemen, by whose labours, experience and valor, the will have been perfected and preserved.

In France, this mode of trial was introduced during the revolution, but was afterwards found inconvenient to the exercise of the imperial power. But the code of 1808, it was so modified as to leave scarcely a remnant of its origin; it became a select corps of forty men chosen by the prefect, who held his office at the will of the crown. It was reduced by successive operations (all by the king's officers) to twenty-one, out of which the accused had the illusory privilege of excepting to nine, and the votes of the majority of the remaining twelve, combined, in no very intelligible manner, with the opinions of the bench, decided his fate. Yet even under this vicious constitution, juries have sometimes been found to interpose between executive power and its victims; and the very name (for it is, in fact, but very little more) of the trial by jury, is now, under the monarchy of France, the object of royal jealousy and fear.

With these examples before us, ought we not, in framing a new code, to impress on the minds of our constituents a sacred attachment to this institution (--- So venerable for its antiquity! So wise in theory! So efficient in practice! So simple in form! In substance so well adapted to its end! The terror of guilt---the best hope of innocence! Venerated by the friends of freedom, detested and abhorred by its foes! Can we too religiously guard this sanctuary into which liberty retire in times of distress? (Obedience to the law, from our

country ') when corruption may pervert, and faction overturn, every other institution framed for its protection. Even in such times, the nation need not despair. A regenerating spirit will never be extinct, while this admirable contrivance for its preservation exists. fostered in this retreat, it will gradually gather strength, and in due time will walk abroad in its majesty over the land, arrest the progress of arbitrary power, strike off the shackles which it has imposed, and restore the blessings of freedom to a people still conscious of their right to enjoy them.

If these reflections should chance to be seen in the other states, they will be considered as a trite repetition of acknowledged truths: here, I have some reason to apprehend they will be thought problematical assertions. But whatever may be their effect, I should, with my ideas of their importance, have been guilty of a dereliction of duty, had I failed to present them. All, however, I think on the subject, more than any language at my command can express, is contained in a single felicitous sentence, written by a man as eminent for learning and genius, as he is admired for the purity of his principles, and his attachment to the institutions of freedom—speaking of jurors, he calls them—

“Twelve invisible judges, whom the eye of the corrupter cannot see, and the influence of the powerful cannot reach, for they are nowhere to be found, until the moment when, the balance of justice being placed in their hands, they hear, weigh, determine, pronounce, and immediately disappear, and are lost in the crowd of their fellow-citizens.”

The other provisions of this book either require no particular elucidation, or will receive it when the work is presented for adoption.

It may, however, be proper to notice a change which is proposed in the law of principals and accessories. As

* Duponceau's address at the opening of the law academy at Philadelphia.

it now stands, two species of offence are designated by this general name,-- distinguished by an awkward periphrase, into 'accessories before the fact' and 'accessories after the fact'. As there is scarcely any difference in common between the offences designated by these two denominations, I have taken away the concluding appellation, and called the fact an accomplice before the description of accessory exclusively to the second. In fact, how can the odious offence of plotting crime, and instigating another to perform that which the contriver has not courage himself to execute, how can this be assimilated to the act of relieving a repentant and suppliant offender, who invokes our pity, and relies on our generosity?--an act, which, though justice may censure, humanity cannot always condemn. The first class now includes some acts which are so much identified with those which constitute the offence, that it was thought more simple, as well as more just, to arrange them under the same head, and by destroying useless distinctions, greatly restrict the number of crimes of *complicity*.

Under the second head, our law now calls for the punishment of acts, which, if not strictly virtuous, are certainly too nearly allied to them to be designated as crimes. The ferocious legislation which first enacted this law, demands (and sometimes under the penalty of the most cruel death) the sacrifice of all the feelings of nature, of all the sentiments of humanity; breaks the ties of gratitude and honour; makes obedience to the law to consist in a dereliction of every principle that gives dignity to man, and leaves the unfortunate wretch, who has himself been guilty of no offence, to decide between a life of infamy and self-reproach, or a death of dishonour. Dreadful as this picture is, the original is found in the law of accessories after the fact. If the father commit treason, the son must abandon, or deliver him up to the executioner. If the son be guilty of a crime, the stern dictates of our law require, that his parent, that the very mother who bore him, that his sisters and brothers, the companions of his infancy,

should expel nature from their hearts, and humanity from their feelings; that they should barbarously discover his retreat, or with inhuman apathy, abandon him to his fate. The husband is even required to betray his wife, the mother of his children; every tie of nature or affection is to be broken, and men are required to be faithless, treacherous, unnatural and cruel, in order to prove that they are good citizens, and worthy members of society. This is one instance, and we shall see others, of the danger of indiscreetly adopting, as a divine precept applicable to all nations, those rules which were laid down for a particular people, in a remote and barbarous age. The provisions now under consideration, evidently have their origin in the Jewish law; that, however, went somewhat further, it required the person connusant of a crime committed by a relation, not only to perform the part of informer, but executioner also. "If thy brother, the son of thy mother; or thy son, or thy daughter, or the wife of thy bosom, or thy friend, which is as thine own soul, entice thee secretly, saying, let us go and serve other gods, thou shalt not consent. . . . Neither shall thine eye pity him neither shalt thou conceal him, thou shalt surely kill him; thou shalt stone him with stones." Almighty power might counteract, for its own purposes, the feelings of humanity, but a mortal legislator should not presume to do it; and in modern times, such laws are too repugnant to our feelings, to be frequently executed, but that they may never be enforced, they should be expunged from every code which they disgrace. The project presented to you, does this, with respect to ours. To put an end to that strife, which such provisions create in the minds of jurors, between their best feelings and their duty, their humanity and their oath; no relation to the principal offender, in the ascending or descending line, or in the collateral, as far as the first degree: no person united to him by marriage, or owing obedience to him as a servant, can be punished as an accessory. Cases of other particular ties of gratitude or friendship cannot be distinguished by law;

they must be left for the consideration of the pardoning power.

I proceed to the plan of the third book, the most important in the work : it enumerates, classes, and defines all offences.

All contraventions of penal law are denominated by the general term, offences. Some division was necessary to distinguish between those of a greater and others of a less degree of guilt. No scale could be found for this measure, so proper as the injury done to society by any given act ; and as the punishment is intended to be proportioned to the injury, the nature of the punishment was fixed on, as the boundary between smaller offences, which are designated as misdemeanors, and those of a more serious nature which are called crimes. The last being such as are punished by hard labour, seclusion, or privation of civil rights, in addition to imprisonment. All other offences are called misdemeanors. In the progress of the work, I have felt some want of another denomination, to distinguish the lighter offences, which are punishable by pecuniary fines only, from those which are called in the English law by the vague appellation of *high misdemeanors* ; and which are punished as well by bodily restraint as by fine. It is possible that in the end, something like the contravention of the French law may be adopted ; but I am at present inclined to think, that the single division I have mentioned will be sufficient.

This first division can be of no utility in the definition of offences, and therefore will find no place in that part of the work ; it is adopted, principally, from the necessity of such a distinction in the general provisions, and will also be found of use in common parlance, and for the purpose of reference.

Offences, including both crimes and misdemeanors, are next classed, in relation to the object affected by them, into public and private.

Here again the law which divides the two classes must, in some measure, be arbitrary, for scarcely any public offence can be committed that does not injure an

individual; and most of the outrages offered to individuals, in some sort, affect the public tranquillity: but the order of the work requires the division, and it is made with as close a view as could be given to the nature of the different offences, as follows:

I. Under the head of public offences are ranked:

Those which affect the sovereignty of the state, in its legislative, executive, or judiciary power.

The public tranquillity; the revenue of the state; the right of suffrage; the public records; the current coin; the commerce, manufactures, and trade of the country; the freedom of the press; the public health; the public property; the public roads, levees, bridges, navigable waters, and other property held by the sovereign power, for the common use of the people; those which prevent or restrain the free exercise of religion, or which corrupt the morals of the people.

II. Private offences are those which affect individuals and injure them

In their reputation; their persons; their political privileges; their civil rights; their profession or trade; their property, or the means of acquiring or preserving it.

Under one or other of these heads, it is believed that all such acts or omissions can be arranged, as it may be proper to constitute offences; unless, indeed, those which relate to societies or corporate bodies may be found, when they come to be defined, not properly assignable to any one of these divisions; in which case, a separate class will be created for them and other miscellaneous offences. It is obvious, that the classification cannot be complete until all the offences are enumerated and defined, and, therefore, this sketch is submitted more to give a general idea of the method, than as a complete plan.

Melancholy, misfortune and despair, sometimes urge the unhappy to an act, which, by most criminal codes, is considered as an offence of the deepest dye; and which, being directed principally against the offender himself, would have required a separate division, if it had been

admitted in this code. It has not ; because its insertion would be contrary to some of the fundamental principles which have been laid down for framing it.

Suicide can never be punished but by making the penalty (whether it be forfeiture or disgrace) fall exclusively upon the innocent. The English mangle the remains of the dead. The intimate body feels neither the ignominy nor pain. The mind of the innocent survivor alone is lacerated by this useless and savage butchery, and the disgrace of the execution is felt exclusively by him, although it ought to fall on the laws which inflict it. The father, by a rash act of self-destruction, deprives his family of the support he ought to afford them ; and the law completes the work of ruin, by harrowing up their feelings ; covering them with disgrace ; and depriving them by forfeiture of their means of subsistence.

Vengeance, we have said, is unknown to our law ; it cannot, therefore, pursue the living offender, much less, with impotent rage should it pounce, like a vulture, on the body of the dead, to avenge a crime which the offender can never repeat, and which certainly holds out no lure for imitation : the innocent, we have assumed, should never be involved in the punishment inflicted on the guilty. But here, not only the innocent, but those most injured by the crime, are exclusively the sufferers by the punishment. We have established as a maxim, that the sole end of punishment is to prevent the commission of crimes ; the only means of effecting this, in the present case, must be by the force of example ; but what punishment can be devised to deter him, whose very crime consists in the infliction upon himself of the greatest penalty your law can denounce ? Unless, therefore, you use the hold which natural affection gives you on his feelings, and restrain him by the fear of the disgrace and ruin with which you threaten his family, your law has no effective sanction ; but humanity forbids this ; the legislator that threatens it, is guilty of the most refined cruelty. If he carries it into execution, he is a savage.

It is either a vain threat, and therefore cannot operate, or if executed with an ill-directed rage, strikes the innocent because the guilty is beyond its reach.

Another species of offence is also omitted, though it figures in every code, from the Mosaic downward, to those of our days, and generally with capital punishments denounced against its commission ; yet I have not polluted the pages of the law which I am preparing for you by mentioning it, for several reasons :

First. Because, although it certainly prevailed among most of the ancient nations, and is said to be frequently committed in some of the modern, yet, I think, in all these cases it may be traced to causes and institutions peculiar to the people where it has been known, but which cannot operate here ; and that the repugnance, disgust, and even horror, which the very idea inspires, will be a sufficient security that it can never become a prevalent one in our country.

Secondly. Because, as every crime must be defined, the details of such a definition would inflict a lasting wound on the morals of the people. Your criminal code is no longer to be the study of a select few : it is not the design of the framers that it should be exclusively the study even of our own sex ; and it is particularly desirable, that it should become a branch of early education for our youth. The shock which such a chapter must give to their pudicity, the familiarity their minds must acquire with the most disgusting images, would, it is firmly believed, be most injurious in its effects : and if there was no other objection, ought to make us pause before we submitted such details to public inspection.

Thirdly. It is an offence necessarily difficult of proof, and must generally be established by the evidence of those who are sufficiently base and corrupt to have participated in the offence. Hence, persons shameless and depraved enough to incur this disgrace, have made it the engine of extortion against the innocent, by threatening them with a denunciation for this crime, and they were generally successful : because, against such an

accusation, it was known that the infamy of the accusation furnished no sure defence.

My last reason for the omission was, that as all our criminal proceedings must be public, the disclosure of the nature would do more injury to the moral character of the people than the secret, and therefore always an error, or a suppression of the offence. I was not a little influenced also by reflecting on the probability that the accused might be made to suffer, either by malicious combination of popular weaknesses, in a case so difficult of defence, or by the ready credit that would be given to circumstantial evidence, where direct proof is not easily procured, and where, from the nature of the crime, a prejudice is created by the very accusation.

In designating the acts which should be declared offences, I could not confine the selection to such as were already prevalent in this country; this would have required, in future, too frequent a recurrence to the work of amendment; nor could I, with propriety, include all the long list of offences which have been enumerated in the codes of other countries. A middle course has been pursued, embracing such prohibitions only as apply to acts which the present, and probably the future, state of society, in our country, may require to be repressed.

The penal laws of most countries have an ample department allotted to offences against religion, because most countries have an established religion which must be supported in its superiority by the penalties of temporal laws. Here, where no pre-eminence is acknowledged, but such as is acquired by persuasion and conviction of the truth; where all modes of faith, all forms of worship, are equal in the eye of the law; and it is left to that of omniscience to discover which is the one most pleasing in its sight; here, the task of legislation, on this head, is simple, and easily performed. It consists in a few provisions for scrupulously preserving this equality, and for punishing every species of discrimination to the disadvantage of all religious rites, while they do not interfere

with public tranquillity : these are, accordingly, all that will be found in the code.

After thus accounting for the omissions I have remarked, it may be proper to notice a new class, inserted in the enumeration of public offences under the head of offences against the freedom of the press. this is new in the legislation of those governments where the liberty of the press is best established and most prized. It has generally been thought a sufficient protection to declare, that no punishment should be inflicted on those who legally exercise the right of publishing ; but hitherto no penalties have been denounced against those who illegally abridge this liberty. Constitutional provisions are, in our republics, universally introduced to assert the right, but no sanction is given to the law. Yet do not the soundest principles require it? If the liberty of publishing be a right, is it sufficient to say that no one shall be punished for exercising it? I have a right to possess my property, yet the law does not confine itself to a declaration that I shall not be punished for using it : something more is done, and it is fenced round with penalties, imposed on those who deprive me of its enjoyment.

Why should there be this difference in the protection which the law affords to those different rights? Not certainly because the one in question is considered as of small moment : every bill of rights since the art of printing has been known, testifies how highly it has been prized. This anomaly may, in states governed by the common law, be accounted for by the reflection, that every breach of a constitutional privilege might there be considered as a misdemeanor, and punished as such, although no penalty were contained in the law. But here, where nothing is an offence but that which is plainly and especially declared to be such by the letter of the law, where we have banished all constructive offences, here our code would be incomplete without the insertion of this class.

All violence or menace of violence, or any other of the

means which are enumerated in the code—all exercise of official influence or authority which may involve this valuable privilege, is declared to be an offence. Nay, the project which will be presented to you goes further. And considering the constitutional position of the law, it amounts to any act of ordinary legislation, and consequently, that all laws in derogation of it are void, and that all those guilty of an offence who shall attempt to exercise abridging or restraining the liberty of the press contrary to the privilege secured by the constitution. It may be said that this is nugatory, because the same authority which makes the code may repeal it, and that the legislature which could so far forget their duty as to violate the constitution, would certainly abrogate the law by which it was made punishable. To this I answer, that the consequence does not follow. Attacks on constitutional rights are seldom openly or directly made; the repeal of this part of the code would be an acknowledgment, on the part of those who procured it, that they were hostile to the right secured by the constitution. This, in a popular government, no representative would dare to avow; and however desirous a faction might be to get rid of this formidable censor of their principles, operations and plans, they would never dare openly to declare their fears. But by means of these provisions in your code, all those insidious attempts by which valuable privileges are generally destroyed, will be prevented; the people will be put on their guard against them; and the judiciary will be armed with legal authority for their punishment and suppression.

I wish to have it distinctly understood, that the preceding division and classification of offences is introduced to give a method to the work, which will aid the memory; render reference more easy; enable the student to comprehend the whole plan, and future legislators to apply amendments and ameliorations with greater effect. But that they are not intended, in any manner, to have a constructive operation. Each offence is to be construed by the definition which is given of it, not by the division or

class in which it is placed. The mixed nature of many offences, and the impossibility of making any precise line of demarcation, even between the two great divisions, render this remark necessary.

After the prohibitory and mandatory part of the penal law, we naturally come to consider its sanction or the means of securing obedience to its provisions.

The first of these are the precautionary measures to prevent the commission of apprehended offences, or to arrest the completion of those which are begun. These are provided for, in the fourth book, and do not, very essentially, differ from those which are known to the English law.

In considering this important branch of the subject, we must refer to the principles established in the preliminary chapter. If those are right, the law punishes, not to avenge, but to prevent crimes ; it effects this, first, by deterring others by the example of its inflictions on the offender ; secondly, by its effects on the delinquent himself ; taking away, by restraint, his power ; and by reformation, his desire of repeating the offence. No punishments, greater than are necessary to effect this work of prevention, let us remember, ought to be inflicted ; and that those which produce it, by uniting reformation with example, are the best adapted to the end. It would be disgusting and unnecessary to pass in review all the modes of punishment which have, even in modern times, been used, rather, it would seem, to gratify vengeance, than to lessen the number of offences. A spirit of enlightened legislation, taught by Montesquieu, Beccaria, Eden, and others ; names dear to humanity ! has banished some of the most atrocious from the codes of Europe. But it has happened, in this branch of jurisprudence, as it has in most other departments of science, that long after the great principles are generally acknowledged, a diversity of opinion exists on their application to particular subjects. Thus, although the dislocation of the joints is no longer considered as the best mode of ascertaining innocence or discovering guilt ; although offences against

the deity are no longer expiated by offerings, and those against the majesty of kings are punished by the pincers, and the rack, and the wheel. The more modern modes of punishment have then substituted the guillotine, equally cruel, are quite unnecessary, and far from the maxims of penal law, it may, therefore, be proper to pass some of them in review.

They may be reduced to three, imprisonment, confiscation of property, exposure to cruel labour on public works, mutilation and other bodily marks of disgrace; stripes, or the infliction of any bodily pain; death.

Banishment, even if it were inefficient, as we can hardly, I think, be thought consistent with the duties which one nation owes to another. The man who is forced from one country, must take refuge in another, and wherever he goes, he carries with him the same propensity to break the laws and corrupt the morals of the natives. The same crimes which make him undutiful to his own, render him mischievous to that society which he seeks for his retreat. Every nation, then, would have a right to complain of laws that made their territory the refuge of banditti, and other malefactors of their own blood. Each, at least, would have a right to refuse the entrance. If all do it, then the punishment cannot be inflicted, or must be commuted into that which is denounced against those who return. If no laws are made to expel them, or guard against their entrance, the favour must be reciprocal, and each nation would be bound to receive from its neighbour a number of foreign rogues, equal to that of the domestic villains they send out. The Romans, who commanded the civilized world, might employ this punishment with effect. In modern times, it is only used (and that rarely) for state offences, and then it is generally dangerous; because the man banished for political crimes, has frequently the power of doing more extensive mischief abroad than at home. It is also a very inefficient remedy; to many it would have no

terrors, and those upon whose love of country it might operate as a punishment, could find many means of evading it by an undiscovered return

Deportation, or rather relegation, is more efficient, because return is more difficult than from simple banishment. It also operates favourably sometimes, by producing reformation, and while enforced, effectually prevents a repetition of the offence, at least on the society where it was first committed. But its effect, as an example, is nearly lost, because the culprit himself scarcely thinks it a punishment; and because the distance causes both him and his crime to be forgotten as completely as if he was removed by death, and its practical operation in England, where it has been long tried under various forms, does not warrant the conclusion that it ought to be adopted here

The legislature of Pennsylvania have received, very favourably, a plan presented by Dr. Mease, recommending this mode of punishment; he has sent me a copy of his papers, which are at the disposal of the general assembly. They are written with ingenuity, but under the circumstances in which this state is placed, I cannot propose his scheme as either a practicable or an advisable mode of disposing of convicts.

Simple imprisonment has obvious defects; as a corrective, it is nearly the worst that could be applied. If solitary, it is, for most offences, too severe. If it be not solitary, it becomes a school for vice and every kind of corruption. The want of employment, even when men are at liberty, leads them to evil associations, and the proverb does not much exaggerate, which calls it the root of all evil. But when to idleness is joined an asso-

* A very respectable witness, examined before the house of commons, says, "as to transportation, I, with deference, think it ought not to be adopted, except for incorrigible offenders, and then it ought to be for life; if it is for seven years, the novelty of the thing, and the prospect of returning to their friends and associates, reconciles offenders to it, so that, in fact, they consider it no punishment, and when this sentence is passed on men, they frequently say, *thank you, my lord*."

ciation with all that is most perfect in the human mind, it may be easily imagined how quickly the mind passes from innocence to vice, from a state of purity to the guilty thus collected, and the other's capacity in the room of their strength, they resort to the same means for their own safety, and are completely disciplined and arrayed in the same manner.

Imprisonment in irons has all the evils of imprisonment, and adds to them the danger of arbitrary imposition. The worst of all, if regulated by law, must be a torture to the mind, the robust delinquent will be a thousand times more at the discretion of the judge than if they are at the discretion of the judge, the better engine for petty tyranny and extortion.

Confiscation of property has few advocates, and few people have none. It has every defect that can attach to any mode of punishment, except that it is in some degree more unequal, because it forfeits for the same offence the largest and the smallest fortune. It is cruel, because it deprives numbers of the means of subsistence for the remainder of their lives. It is unjust, for it punishes, without distinction, the innocent as well as the guilty. It is liable to the worst of abuses, because it makes it the interest of the government to multiply convictions. This last characteristic is perhaps the reason why it retains a place in the penal jurisprudence of Europe.

The next four heads may be classed together—the pillory, stocks, and other contrivances for public exposure, labour in chains, and on the public works, indelible marks of disgrace (always attended with bodily pain), and the infliction of stripes, all are liable to the same radical objections; they all discard the idea of reformation; all are unequal, and subject to arbitrary imposition; with the exception of public labour, they are all momentary in their application, and when the operation is over, they impose a necessity on the patient, with the alternative of starving, immediately to repeat his offence; he accordingly, with increased desperation, commences a new

career; forms a corps of similar associates to prey upon society; seduces others by the example of his impunity in the numerous instances in which he escapes detection; swells the list of convictions in those where his vigilance is defeated, and finally becomes a fit subject for the grand remedy—the punishment of death. I approached the inquiry into the nature and effect of this punishment with the awe becoming a man who felt, most deeply, his liability to err, and the necessity of forming a correct opinion on a point so interesting to the justice of the country, the life of its citizens, and the character of its laws. I strove to clear my understanding from all prejudices which education, or early impressions might have created, and to produce a frame of mind fitted for the investigation of truth, and the impartial examination of the arguments on this great question. For this purpose, I not only consulted such writers on the subject as were within my reach, but endeavoured to procure a knowledge of the practical effect of this punishment on different crimes in the several countries where it is inflicted. In my situation, however, I could draw but a very limited advantage from either of these sources. Very few books on penal law, even those most commonly referred to, are to be found in the scanty collections of this place, and my failure in procuring information from the other states, is more to be regretted on this than any other topic on which it was requested. With these inadequate means, but after the best use that my faculties would enable me to make of them; after long reflection, and not until I had canvassed every argument that could suggest itself to my mind, I came to the conclusion, that the punishment of death should find no place in the code which you have directed me to present. In offering this result, I feel a diffidence, which arises, not from any doubt of its correctness; I entertain none; but from the fear of being thought presumptuous in going beyond the point of penal reform, at which the wisdom of the other states has hitherto thought proper to stop; and from a reluctance to offer my

opinions in opposition to those which I have been led to respect than my own) with a total want of propriety of this punishment to the crime, and to a mere speculative question, I have not been able to give authority; but here I could not resist the influence of you have reposed in me, were I to do so, I should be of others, no matter how reported, and I should be instead of those which my best judgment tells me were right.

The example of the other states which are attached to great respect; the greater, because of their reputation, still retain this punishment, but the example has some of its force when we reflect on the slow progress of all improvement, and on the stubborn principles of the common law, which have particularly retarded it in our jurisprudence.

In England, their parliament had been debating for near a century before they would take off a capital punishment from two or three cases, in which every body allowed it was manifestly cruel and absurd; they have retained it in at least an hundred others of the same description; and when we reflect on the facts, and observe the influence which the prevailing opinions of that country have always had on the literature and jurisprudence of ours, we may account for the several states having stopped short in the reform of their penal law, without supposing them to have arrived at the point of perfection, beyond which it would be both unwise and presumptuous to pass. As to the authority of great names, it loses much of its force since the mass of the people have begun to think for themselves; and since legislation is no longer considered as a trade, which none can practice with success, but those who have been educated to understand the mystery; the plain matter of fact, practical manner, in which that business is conducted with us, refers more to experience of facts than theory of reasoning: more to ideas of utility drawn from the state of society, than from the opinions of authors on the subject. If the argument were to be carried by the authority of names,

that of Beccaria, were there no other, would ensure the victory. But reason alone, not precedent nor authority, must justify me in proposing to the general assembly this important change; reason alone can persuade them to adopt it. I proceed therefore to develop the considerations which carried conviction to my mind, but which being perhaps now more feebly urged than they were then felt, may fail in producing the same effect upon others. A great part of my task is rendered unnecessary, by the general acknowledgment, universal, I may say, in the United States, that this punishment ought to be abolished in all cases, excepting those of treason, murder and rape. In some states arson is included; and lately, since so large a portion of our influential citizens have become bankers, brokers, and dealers in exchange, a strong inclination has been discovered to extend it to forgery, and uttering false bills of exchange. As it is acknowledged then to be an inadequate remedy for minor offences, the argument will be restricted to an inquiry, whether there is any probability that it will be more efficient in cases of greater importance. Let us have constantly before us, when we reason on this subject, the great principle, that the end of punishment is the prevention of crime. Death, indeed, operates this end most effectually, as respects the delinquent; but the great object of inflicting it is the force of the example on others. If this spectacle of horror is insufficient to deter men from the commission of slight offences, what good reason can be given to persuade us that it will have this operation where the crime is more atrocious? Can we believe that the fear of a remote and uncertain death will stop the traitor in the intoxicating moment of fancied victory over the constitution and liberties of his country?—while in the proud confidence of success, he defies heaven and earth, and commits his existence to the chance of arms, that the dread of this punishment will “check his pride;” force him, like some magic spell, to yield obedience to the laws, and abandon a course which, he persuades himself, makes

a "virtue" of his "ambition." Will it not be the case, that the infuriate wretch will not be deterred by the prospect of gratifying the strongest passion of his nature, by the prospect of his deadly enemy? Will it not be the case, that the secret assassin, who meditates the murder of his enemy, will not be deterred by the prospect of an obstacle to his enjoyment of world and flesh? Will it not be the case, that the man who is actuated by the strongest passion, and by the strongest motives, will not be deterred by the prospect of the indulgence of the slightest criminal propensity? It may be true, it must be confessed, that it is not a question, which will be found more difficult to solve, than we reflect that great crimes are, for the most part, committed by men whose long habits of guilt have almost obliterated the idea of death; or to whom those passions, or natural courage have rendered it, in some measure, indifferent; and that the cowardly prisoner or assassin always thinks that he has taken such precautions as will prevent any risk of discovery. The fear of death, therefore, will rarely deter from the commission of great crimes. It is, on the contrary, a remedy peculiarly inapplicable to those offences. Ambition, which usually inspires the crime of treason, soars above the fear of death; avarice, which whispers the secret murder, creeps below it; and the brutal debasement of the passion that prompts the only other crime, thus punished by our law, is proverbially blind to consequences, and regardless of obstacles that impede its gratification—threats of death will never deter men who are actuated by these passions; many of them affront it in the very commission of the offence, and therefore readily incur the lesser risk of suffering it, in what they think the impossible event of detection. But present other consequences more directly opposed to the enjoyments which were anticipated in the commission of the crime, make those consequences permanent and certain, and then, although milder, they will be less readily risked than the momentary pang attending the loss of life; study the passions which first suggested the offence, and apply your punishment to mortify and subvert them. The ambitious man cannot bear the

ordinary restraints of government—subject him to those of a prison ; he could not endure the superiority of the most dignified magistrate—force him to submit to the lowest officer of executive justice ; he sought, by his crimes, a superiority above all that was most respectable in society—reduce him in his punishment to a level with the most vile and abject of mankind. If avarice suggested the murder—separate the wretch for ever from his hoard ; realize the fable of antiquity ; sentence him, from his place of penitence and punishment, to see his heirs rioting on his spoils ; and the corroding reflection that others are innocently enjoying the fruits of his crime, will be as appropriate a punishment in practical as it was feigned to be in poetical justice. The rapacious spend-thrift robs to support his extravagance, and murders to avoid detection ; he exposes his life that he may either pass it in idleness, debauchery and sensual enjoyment, or lose it by a momentary pang—disappoint his profligate calculation ; force him to live, but to live under those privations which he fears more than death ; let him be reduced to the coarse diet, the hard lodging, and the incessant labour of a penitentiary.

Substitute these privations, which all such offenders fear, which they have all risked their lives to avoid ; substitute these, to that death which has little terror for men whose passions or depravity have forced them to plunge in guilt, and you establish a fitness in the punishment to the crime ; instead of a momentary spectacle, you exhibit a lesson, that is every day renewed ; and you make the very passions which caused the offence the engines to punish it, and prevent its repetition.

Reformation is lost sight of in adopting this punishment, but ought it to be totally discarded ? May not even great crimes be committed by persons whose minds are not so corrupted as to preclude the hope of this effect ? They are, sometimes, produced by a single error—often are the consequences of a concatenation of circumstances never likely again to occur, and are very frequently the effect of a momentary hallucination, which, though not

sufficient to excuse ought sometimes to be admitted, yet the operation of this severity is not a gradual gradation in the degrees of guilt which is levelled before this destructive power. It is the base seducer who has deceived his country, the traitor who has betrayed his country, the assassin who has murdered his country, the slanderer who has slandered his country, the hireling who has hired his country, the poisoner who has poisoned his country, the artful insinuator who has insinuated his country, the veteran in vice, must perish on the same scaffold and the hardened and irrelatible instigator of his crime. It may be said, that the pardoning power is the proper remedy for this evil; but the pardoning power, except in cases, must be exercised, if at all, without loss of time, without that insight into character which the penitentiary system affords. It is, therefore, necessary to abuse; and there is this further objection to its exercise, that it leaves no alternative between death and entire exemption from punishment; but in every degree of crime, some punishment is necessary; the novice, if subject to no reclaiming discipline, will soon become a professor in guilt: but let the corrective be judiciously applied, and its progress will discover whether he may be again trusted in society, or whether his depravity is so rooted as to require continued confinement.

In coming to a resolution on this solemn subject, we must not forget another principle we have established, and I think on the soundest reasons, that other things being equal, that punishment should be preferred, which gives us the means of correcting any false judgment, to which passion, indifference, false testimony, or deceiving appearances, may have given rise. Error from these, or other causes, is sometimes inevitable, its operation is instantaneous, and its fatal effects in the punishment of death, follow without delay; but time is required for its

correction; we retrace our steps with difficulty; it is mortifying to acknowledge that we have been unjust, and during the time requisite for the discovery of the truth, for its operation on our unwilling minds, for the interposition of that power, which alone can stop the execution of the law, its stroke falls, and the innocent victim dies. What would not then the jurors who convicted; the judges who condemned; the mistaken witness who testified to his guilt; what would not the whole community who saw his dying agonies, who heard, at that solemn moment, his fruitless asseverations of innocence; what would they not all give to have yet within their reach the means of repairing the wrongs they had witnessed or inflicted?

Instances of this kind are not unfrequent; many of them are on record; several have taken place in our own day, and a very remarkable example which was given but a few years since, in one of the northern states, shows, in a striking manner, the danger of those punishments which cannot be recalled or compensated, even though the innocence of the sufferer is rendered clear to demonstration. A few such instances, even in a century, are sufficient to counteract the best effects that could be derived from example. There is no spectacle that takes such hold on the feelings as that of an innocent man suffering by an unjust sentence; one such example is remembered, when twenty of merited punishment are forgotten; the best passions take part against the laws, and arraign their operation as iniquitous and inhuman. This consideration alone, then, if there were no others, would be a most powerful argument for the abolition of capital punishments; but there are others no less cogent.

To see a human being in the full enjoyment of all the faculties of his mind, and all the energies of his body; his vital powers attacked by no disease; injured by no accident; the pulse beating high with youth and health; to see him doomed by the cool calculation of his fellow-men to certain destruction, which no courage can repel, no art or persuasion avert; to see a mortal distribute the most

awful dispensations of the Deity, and, by his own decree, an overwhelming existence which Almighty power should destroy. It is to solemn reflections, which the magnitude of human sacrifice naturally produces, that the recurrence renders the mind insensible. But in a country where the punishment of death is inflicted, this sensation operates in a different manner. The people are always strongly excited by every trial for a capital offence; they neglect their business and crowd round the court; the accused, the witness, the counsel, everything connected with the investigation becomes a matter of interest and curiosity, when the public mind is screwed up to this pitch, it will take a long time to get the circumstances of the case, which will rarely be found to accord with the impartiality acquired by habit.

If the accused excite an interest from his youth, his good character, his connections, or even his countenance and appearance, the dreadful consequences of conviction, and that, too, in the case of great crimes as well as minor offences, lead prosecutors to relax their severity, witnesses to appear with reluctance, jurors to acquit against evidence, and the pardoning power improperly to interpose. If the public excitement take another turn, the consequences are worse; indignation against the crime is created into a ferocious thirst of vengeance; and if the real culprit cannot be found, the innocent suffers on the slightest presumption of guilt; when public zeal requires a victim, the innocent lamb is laid on the altar, while the scape-goat is suffered to fly to the mountain. This savage disposition increases with the severity and the frequency of capital inflictions, so that in atrocious as well as in lighter offences, this species of punishment leads sometimes to the escape of the guilty, often to the conviction of the innocent.

Whoever has at all observed the course of criminal proceedings, must have witnessed what I have just endeavoured to describe; undeserved acquittals, unjust

severity; opposite effects proceeding from the same cause; the unnecessary harshness of the punishment.

But when no such fatal consequences are to be the result, the course of justice is rarely influenced by passion or prejudice. The evidence is produced without difficulty, and given without reluctance; it has its due effect on the minds of jurors, who are under no terrors of pronouncing an irremediable sentence and pardons need not be granted, unless innocence is ascertained, or reformation becomes unequivocal.

Another consequence of the infliction of death is, that if frequent it loses its effect; the people become too much familiarized with it to consider it as an example; it is changed into a spectacle, which must frequently be repeated to satisfy the ferocious taste it has formed. It would be extremely useful in legislation, if the true cause could be discovered of this atrocious passion for witnessing human agonies and beholding the slaughter of human beings. It has disgraced the history of all nations; in some it gave rise to permanent institutions, like that of the gladiators in Rome; in others it has shown itself like a moral epidemic, which raged with a violence proportioned to the density of population, for a limited time, and then yielded to the influence of reason and humanity. Every people has given us instances of this delirium; but the religious massacre of St. Bartholomew, and the political slaughters during the reign of terror in France, exemplify, in a striking manner, the idea I mean to convey. The history of our own country, young as it is, is not free from this stain. The judicial murder of the wizards and witches of New England, and of a great number of poor wretches, during what was called the negro-plot at New York, furnish us with domestic lessons on this subject. The human sacrifices which we find in the early history of almost every nation, proceeded from another cause, the idea of vicarious atonement for sin; but they were attended with the same heart-hardening effect. Human sufferings are never beheld, for the first time, but with aversion, terror and

disgust. Nature has strongly implanted this repugnance on our minds, for the wisest purpose; but it, once conquered, it happens in the intellectual as well as in that of the senses; in relation to what is first observed, that we become most fond of the very object which required, in the beginning, some effort to overcome the disgust produced by their first view, and that our attachment to them is in proportion to the difficulty which was conquered in becoming familiarized to them. Whatever may be the cause of this striking fact, in the history of the human mind, its effect ought to be ruled by the legislator who desires to form a wise and permanent system. If the sight of one capital execution creates an inhuman taste to behold another, if a curiosity, satisfied at first with terror, increases with acquaintance, and becomes a passion by indulgence, we ought to be extremely careful how, by sanctioning the frequency of capital punishments, we lay the foundation for a depravity, the more to be dreaded, because, in our government, popular opinion must have the greatest influence on all its departments, and this vitiated taste would soon be discovered in the decisions of our courts and the verdicts of our juries.

But if this punishment be kept for great occasions, and the people are seldom treated with the gratification of seeing one of their fellow-creatures expire by the sentence of the law; a most singular effect is produced; the sufferer, whatever be his crime, becomes a hero or a saint; he is the object of public attention, curiosity, admiration, and pity. Charity supplies all his wants, and religion proves her power, by exhibiting the outcast and murderer, though unworthy to enjoy existence upon earth, yet purified from the stain of his vices and crimes, converted by her agency into an accepted candidate for the happiness of heaven; he is lifted above the fear of death by the exhortations and prayers of the pious; the converted sinner receives the tender attentions of respectability, beauty and worth; his prison becomes a place of pilgrimage, his tenant, a saint awaiting the crown of martyrdom; his last looks

are watched, with affectionate solicitude ; his last words are carefully remembered and recorded ; his last agonies are beheld with affliction and despair ; and after suffering the ignominious sentence of the law, the body of the culprit whose death was infamy, and whose life was crime, is attended respectfully and mournfully to the grave, by a train that would not have disgraced the obsequies of a patriot or a hero. This sketch, though highly coloured, is drawn from life : the inhabitants of one of the most refined and wealthy of our state capitals, sat for the picture, and although such exalted feelings are not always excited, or are prudently repressed, yet they are found in nature, and in whatever degree they exist, it cannot be doubted, that in the same proportion, they counteract every good effect that punishment is intended to produce. The hero of such a tragedy can never consider himself as the actor of a mean or ignoble part ; nor can the people view in the object of their admiration or pity, a murderer and a robber, whom they would have regarded with horror, if their feelings had not been injudiciously enlisted in his favour. Thus the end of the law is defeated, the force of example is totally lost, and the place of execution is converted into a scene of triumph for the sufferer, whose crime is wholly forgotten, while his courage, resignation, or piety, mark him as the martyr, not the guilty victim, of the laws.

Where laws are so directly at war with the feelings of the people whom they govern, as this and many other instances prove them to be, these laws can never be wise or operative, and they ought to be abolished.

Quid leges sine moribus, vanae proficiunt ? But if laws unsupported by the morals of the people are inefficient, how can we reasonably expect that they will have any effect when they are counteracted by moral feelings as well as by ideas of religion. This is the effect of capital punishments in a country where they are not commonly inflicted. Let us now see what is their result, where they are unhappily too frequent.

In England, a great portion of the eloquence and

learning, and all the humanity of the nation are at work, in an endeavour, not to abolish the punishment of death (that proposition would be too bold in a government where reform, in any department, might lead to revolution in all), but to restrict it to the more atrocious offences. This has produced a parliamentary inquiry, in the course of which the reports, to which I have alluded before, were made; one of them contains the examinations of witnesses before a committee of the house of commons. From one of these, that of a solicitor who had practised for more than twenty years in the criminal courts, I make the following extracts:

"In the course of my practice, I have found that the punishment of death has no terror upon a common thief; indeed, it is much more the subject of ridicule among them than of serious deliberation. The certain approach of an ignominious death does not seem to operate upon them; for after the warrant has come down, I have seen them treat it with levity. I once saw a man, for whom I had been concerned the day before his execution, and on offering him condolence, and expressing my concern at his situation, he replied, with an air of indifference, 'players at bowls must expect rubbers;' and this man I heard say, that it was only a few minutes, a kick and a struggle, and all was over. The fate of one set of culprits, in some instances, had no effect, even on those who were next to be reported for execution; they play at ball and pass their jokes as if nothing was the matter. I have seen the last separation of persons about to be executed. There was nothing of solemnity about it, and it was more like the parting for a country journey, than taking their last farewell. I mention these things, to show what little fear common thieves entertain of capital punishment; and that so far from being arrested in their wicked courses by the distant possibility of its infliction, they are not even intimidated by its certainty.

Another of those respectable witnesses (a magistrate of the capital) being asked whether he thought that capital punishment had much tendency to deter criminals

from the commission of offences, answered, "I do not. I believe it is well known to those who are conversant with criminal associations in this town, that criminals live and act in gangs and confederacies, and that the execution of one or more of their own body, seldom has a tendency to dissolve the confederacy, or to deter the remaining associates from the continuance of their former pursuits. Instances have occurred within my own jurisdiction, to confirm me in this opinion. During one sitting, as a magistrate, three persons were brought before me for uttering forged notes. During the investigation, I discovered that those notes were obtained from a room in which the body of a person named Wheller (executed on the preceding day, for the same offence) then was laid, and that the notes in question were delivered for circulation by a woman with whom he had been living. This is (he adds) a strong case, but I have no doubt that it is but one of very many others."

The ordinary of Newgate, a witness better qualified than any other to give information on this subject, being asked, "Have you made any observations as to the effect of the sentence of death upon the prisoners?" answers—"It seems scarcely to have any effect upon them; the generality of people under sentence of death are thinking, or doing rather, any thing than preparing for their latter end." Being interrogated as to the effect produced by capital executions on the minds of the people, he answers, "I think shock and horror at the moment, upon the inexperienced and the young, but immediately after the scene is closed, forgetfulness altogether of it, leaving no impression on the young and inexperienced. The old and experienced thief says, the chances have gone against the man who has suffered; that is of no consequence, that is what was to be expected; making no serious impression on the mind. I have had occasion to go into the press-yard within an hour and a half after an execution, and I have there found them amusing themselves, playing at balls or marbles, and appearing precisely as if nothing had happened."

No colouring is necessary to heighten the effect of these sketches. Nothing, it appears to me, can more fully prove the utter inutility of this waste of human life, its utter inefficiency as a punishment, and its demoralizing operation on the minds of the people.

The want of authentic documents prevents me at present from laying before the general assembly some facts which would elucidate the subject, by examples, from the records of criminal courts in the different states. The prevalence of particular offences, as affected by the changes in their criminal laws; the number of commitments, compared with that of convictions; and the effect which the punishment of death has on the frequency of the crimes for which it is inflicted: accurate information on these heads would have much facilitated the investigation in which we are engaged. But although from the causes which I have stated, these are not now within our reach; there are yet some facts generally known on the subject, which are not devoid of interest or instruction. Murder, in all the states, is punished with death; in most of them it is, except treason (which never occurred under the state laws), the only crime that is so punished. If this were the most efficacious penalty to prevent crimes, this offence would be one of which we should see the fewest instances. Is it so? To answer this question, we must establish a comparison, not between it and other offences,—that would never lead us to a true result; there are some crimes that are so destructive of the very existence of society, create such universal alarm, and suppose so great a depravity, that the perpetrator is always viewed with abhorrence by the whole community, and public execration would inflict a punishment, even if the laws were silent. The number of such crimes, therefore, whatever may be the punishment assigned to them, must necessarily be fewer, in proportion, than those which do not inspire the same horror, or spread the same alarm; of this nature is murder; we must, therefore, look to other countries, to establish our point.

Unfortunately, the crime is punished in the same manner as it is here, in the only country we have sufficient data to reason upon, and therefore the result of the inquiry cannot be conclusive ; but if in that country a number of other offences are punished with death, which do not incur that penalty here, and if those minor offences prevail in a much greater degree there than they do here, where they are not so punished, while murder, and robbery with intent to murder (almost the only crimes punished in that manner here), be more frequently committed in this country than in that which I select for the comparison, then we shall have some reason to doubt the efficacy of this violent remedy.

In London and Middlesex, for sixteen years ending in 1818, thirty-five persons were convicted of murder, and stabbing with intent to murder, which is an average of a fraction more than two in a year. In the city of New Orleans, seven persons suffered for the same crime, in the space of the last four years, which is very little less than the same average ; but the population of New Orleans did not, during the period, amount to more than 35,000, which is to that of Middlesex and London, in round numbers, as one to twenty-seven ; therefore, the crime of murder was nearly twenty-seven times as frequent, in proportion to numbers, as in London. Almost the same proportion holds between the whole state and England and Wales, in relation to this crime ; nineteen executions having taken place for murder, in the last seven years, in Louisiana, and one hundred and fifty-four during the seven years, ending in 1818, in England and Wales. In London and Middlesex, eight hundred and eighty-five persons were convicted of forgery and counterfeiting in seven years, ending in 1818. During an equal period, seven persons were convicted of the same offence in the whole state, which makes the crime eighteen times more frequent in London, in proportion to number, than it is here. Six thousand nine hundred and seventy-four convictions for larceny took place in the same seven years in London ; and for a like

period in the state of Louisiana one hundred which is near ten to one more than the proportion in the population. Many capital convictions have been there for crimes of which none were convicted here, and which, if they had been, would have been punished only by imprisonment at hard labour. I well know that the state of society in the two countries, the degree of temptation, the ease or difficulty of obtaining subsistence, and other circumstances, as well as the operation of the laws, may produce the difference I have shown. But does it not raise serious doubts as to the efficacy of the capital punishment, to observe this double effect, that almost the only crime which we punish in that manner, is more frequent in the proportion of twenty seven to one, while those which are the object of a milder sanction, are almost in the same ratio less than in the country with which we make the comparison?

The laws of none of the states punish highway robbery with death; those of the United States affix this punishment to the robbery of the mail, under circumstances which generally accompany it. Yet it is believed that this last species of highway robbery is more frequent than the other—another proof that the fear of death is not a more powerful preventative of crime than other punishments.

I do not urge the doubts which many wise and conscientious persons have entertained of the right of inflicting this punishment, because I am inclined to think that the right can be well established. If this measure be the only one that can prevent the crime, government has a right to adopt it, unless the evil arising from the punishment be greater than that which could be apprehended from the offence. If it were proved, that the fruit in a garden could not be preserved without punishing the boys who stole it with death, the evil to be apprehended from the offence is so much less than that produced by the punishment, that it ought never to be inflicted by the law, much less (as in the case of the Swedish spring guns) by the private individual; but on the

contrary, it is a less evil to destroy the life of an assassin, than to permit him to take that of a man, whose existence is useful to his country, and necessary to his family. Whenever, therefore, in this latter case, the alternative is proved to be the only one, I do not think we ought to hesitate from any doubt of the right : but if the necessity of the punishment, as well as the preponderating evil of the crime, cannot be clearly shown, the right cannot exist. The burthen of argument rests here on those who advocate this punishment, they must show that it is the only means of repressing the offence : they must show, that in the cases to which they mean to apply it, the evil of the offence is greater than the punishment. How far they can succeed in the first part of this task, has been already, in part, examined, on the latter branch of the position it may be proper to observe, that in estimating the evil resulting from the impunity of any particular offence, in order to compare it with that of the punishment, we must recollect, that the one is a certain, the other a problematical evil. For instance, a man commits murder, if it were certain, if you did not put him to death, either that he himself would repeat the offence, or that the example of his impunity would induce another to do it, the case both of necessity to prevent crime, and of the preponderating evil of the offence over that of the remedy, would be made out. But it does not follow, because a man has once committed a crime, he will therefore repeat it, nor that another will be seduced by his example to do so : both, I grant, are probable ; then we have the probability of two evils to put in competition with the certainty of one ; but a strong probability of a great evil ought to countervail the certainty of a smaller one ; and if in this instance the probability be great, that society might suffer the loss of its worthiest citizens, this ought not to be placed in competition with the evil of putting an assassin to death. But if by other means, the chance of the uncertain evil can be reduced to a bare possibility, then the certain evil should not be incurred. Admitting, therefore, that

the infliction of death is the best means of preventing the repetition of the offence, yet a perpetual punishment would as effectually prevent the criminal from repeating it, and would also operate to prevent the crime to reduce to a possibility the chance of repetition induced by the mildness of the punishment to commit the crime, then the certain evil of taking away human life ought not to be incurred, because the remote possibility of even a great evil cannot justify it.

But before we adopt any of these calculations (always liable to the greatest difficulty in practice), we ought to inquire whether the position which alone renders them necessary be true; whether the punishment of death is necessary to prevent offences. In the proper sense of the expression, we know this is not the case, to say that a certain single cause is necessary to produce a given effect supposes, that if the cause exist, the effect will certainly follow; but it is not pretended that the punishment of death will, in all cases, prevent the crime for which it is inflicted; all that is meant is, that it is better adapted to that end than any other kind of punishment. Some reasons have already been given to show that it is not. Let us examine those which are usually given on the affirmative side of this interesting question.

First. There are those who support it by arguments drawn from religion. The divine spirit infused into the great legislator of the Jews, from whose code these arguments are drawn, was never intended to inspire a system of universal jurisprudence. The theocracy given as a form of government to that extraordinary people, was not suited to any other; as little was the system of their penal laws, given on the mysterious mountain, promulgated from the bosom of a dark cloud, amid thunder and lightning; they were intended to strike terror into the minds of a perverse and obdurate people; and as one means of effecting this, the punishment of death is freely denounced for a long list of crimes; but the same authority establishes the *lex talionis*, and other regulations, which those who quote this authority would surely not

wish to adopt. They forget that the same Almighty author of that law, at a later period, inspired one of his prophets with a solemn assurance, that might with propriety be placed over the gates of a penitentiary, and confirmed it with an awful asseveration,—“AS I LIVE, saith the LORD GOD, I have no pleasure in the DEATH of a sinner, but rather that he should TURN FROM HIS WICKEDNESS AND LIVE.” They forget, too, although they are Christians who use this argument, that the divine author of their religion expressly forbids the retaliatory system, on which the punishment of death for murder is founded; they forget the mild benevolence of his precepts, the meekness of his spirit, the philanthropy that breathes in all his words, and directed all his actions; they lose sight of that golden rule which he established: “To do nothing to others that we would not desire them to do unto us;” and certainly pervert the spirit of his holy and merciful religion, when they give it as the sanction for sanguinary punishments. Indeed, if I were inclined to support my opinion by arguments drawn from religion, the whole New Testament should be my text, and I could easily deduce from it authority for a system of reform as opposed to one of extermination. But although the legislator would be unworthy of the name, who should prescribe anything contrary to the dictates of religion, and particularly to those of that divine morality on which the Christian system is founded, yet it would not be less dangerous, to make its dogmas the ground-work of his legislation, or to array them in defence of political systems. In a government, where all religions have equal privileges, it would be obviously unjust; it would lessen the reverence for sacred, by mixing them with political institutions, and perverting to temporal uses those precepts which were given as rules for the attainment of eternal happiness.

Secondly. The practice of all nations, from the remotest antiquity, is urged in favour of this punishment; the fact, with some exceptions, is undoubtedly true, but is the inference just? There are general errors, and

unfortunately for mankind, but few general truths, established by practice, in government legislation. Make this the criterion, and despotism is, by many thousand degrees on the scale of antiquity, better than a representative government: the laws of Draco were more ancient than those of Solon, and consequently better; and the practice of torture quite as generally diffused as that of which we are now treating. Idolatry in religion, tyranny in government, capital punishments, and inhuman tortures in jurisprudence, are coeval and coextensive. Will the advocates of this punishment admit the force of their argument in favour of all these abuses? If they do not, how will they apply it to the one for which they argue?

The long and general usage of any institution gives us the means of examining its practical advantages or defects: but it ought to have no authority as a precedent, until it be proved, that the best laws are the most ancient, and that institutions for the happiness of the people are the most permanent and most generally diffused. But this unfortunately cannot be maintained with truth; the melancholy reverse forces conviction on our minds. Every where, with but few exceptions, the interest of the many has, from the earliest ages, been sacrificed to the power of the few. Every where penal laws have been framed to support this power; and those institutions, favourable to freedom, which have come down to us from our ancestors, form no part of any original plan, but are isolated privileges which have been wrested from the grasp of tyranny, or which have been suffered, from inattention to their importance, to grow into strength.

Every nation in Europe has, during the last eight or ten centuries, been involved in a continual state of internal discord or foreign war: kings and nobles continually contending for power, both oppressing the people, and driving them to desperation and revolt. Different pretenders, asserting their claims to the throne of deposed or assassinated kings, solicited wars, civil dissensions, partition of kingdoms, conquests of provinces, and a long

the skill and diligence of the historian to unravel and record. Add to this, the ignorance in which the human mind was involved, during the early and middle part of this period ; the intolerant bigotry, which from its close connection with government, stifled every improvement in politics as well as every reformation in religion ; and we shall see a state of things certainly not favourable for the formation of wise laws on any subject ; but particularly ill calculated for the establishment of a just or humane criminal code. From such legislators, acting in such times, what could be expected, but that which we actually find ; a mass of laws unjust, because made solely with a view to support the temporary views of a prevailing party ; unwise, obscure, inhuman, inconsistent, because they were the work of ignorance, dictated by interest, passion, and intolerance. But it would scarcely seem prudent to surrender our reason to authorities thus established, and to give the force of precedent to any of the incoherent collections of absurd, cruel, and contradictory provisions which have been dignified with the name of penal codes, in the jurisprudence of any nation in Europe, as their laws stood prior to the last century. No one would surely advise this ; why then select any part of the mass, and recommend it to us, merely because it has been generally practised ? If there is any other reason for adopting it, let that be urged, and it ought to have its weight ; but my object here is to show that from the mode in which the penal laws of Europe have, until a very late period, been established, very little respect is due to them merely on account of their antiquity, or of the extent to which they have prevailed. If the criminal jurisprudence of the modern and middle ages affords us little reason to revere either its humanity or justice ; that of the ancient world does not give us more. The despotism of antiquity was like that of modern times, and such as it will always be ; it can have but one character, which the rare occurrence of a few mild or philosophic monarchs does not change ; and in the laws of the republics, there was a mixture of

severity and indulgence that might be considered as proper models for imitation. Yet in Rome, for the space of a hundred and fifty years, the law was so severe, that no law until the institution of the emperor Augustus, and by the imperial power, it was not lawful to condemn a citizen to death for any crime, and yet it is a common history that offences were unusually perpetrated during that period: but we do know that when executions became frequent, Rome was the receptacle of every crime and every vice. It must, however, be confessed that we have not sufficient information to determine whether the frequency of capital punishments was the cause or the effect of this depravity.

Modern history affords us two examples which deserve to be attended to in this discussion. The empress, Elizabeth of Russia, soon after she came to the throne, abolished the pain of death in all her extensive dominions; her reign lasted twenty years, giving ample time to try the effect of the experiment, and she speaks with enthusiasm of the consequences it had produced. I have not been able to procure the regulations by which this change was effected, but as I believe the *knout* (an infliction more cruel than a speedy death) was preserved, I do not urge this example as having the same weight it would have, if milder punishments had been substituted. Three years after Elizabeth had ceased to reign in the north of Europe, her great experiment was renewed in the south. Leopold became grand duke of Tuscany, and one of his first acts was a declaration (rigidly adhered to during his reign) that no offence should be punished with death; he substituted a mild system of graduated punishments, and though I do not think they were very judiciously chosen, yet the consequence was, an immediate decrease in the number of offences. We are informed, that during a considerable period, the prisons were empty, and no complaints for atrocious offences occurred; and he himself, after an experiment of twenty years, declares, that the mildness of punishments, compared with the former

attention to prevent crimes, and also great despatch in the trial, together with a certainty and suddenness of punishment to real delinquents, had, instead of increasing the number of crimes, considerably diminished that of the smaller ones, and rendered those of an ATROCIOUS NATURE VERY RARE." This passage is extracted from the introduction to a code which he gave to his people in the year 1786 four years afterwards, he was called to the empire, and the further course of his noble experiment was interrupted. How far the old system was re-established, I am not accurately informed, but some travellers represent, that the new state of things forms a contrast very much in favour of the Leopold code. These instances, I think, turn the scale of argument as it applies to the authority of example; if we can rely on that of Tuscany (and it seems perfectly well authenticated), it proves the inefficiency of capital punishments, in great as well as smaller offences, and it is of more weight than the united practice of all the nations of the world where the punishment is retained, but where it has never been found effectual to repress the prevalence of crimes.

The third and last argument I have heard urged, is nearly allied to the second; it is, the danger to be apprehended from innovation. I confess, I always listen to this objection with some degree of suspicion. That men who owe their rank, their privileges, their emoluments, to abuses and impositions, originating in the darkness of antiquity, and consecrated by time; that such men should preach the danger of innovations, I can well conceive; the wonder is, that they can find others weak and credulous enough to believe them. But in a country where these abuses do not exist; in a country whose admirable system of government is founded wholly on innovation, where there is no antiquity to create a false veneration for abuses, and no apparent interest to perpetuate them; in such a country, this argument will have little force against the strong reasons which assail it. Let those, however, who honestly entertain this

doubt, reflect that most fortunate to have lived and for their posterity they live in an age of advancement not in art, not in science, that we have reached a rapid progress toward perfection. The country we now speak has received and is daily experiencing improvement, how long it shall continue to improve, your judges were made independent. Some personal liberty was secured, and religious persecution ended. All these were, in their time, innovations which had not been now proposed. The true use of this objection, and then I confess it has force, is to prevent any hasty experiment, or the introduction of any change that is not strongly recommended by reason. I do not object to it for the one that is now under discussion, but I respectfully urge that it would be unwise to adopt it, merely because it is untried, if we are convinced it will be beneficial. Should our expectations be disappointed, no extensive evil can be done, the remedy is always in our power. Although an experiment, it is not a hazardous one, and the only inquiry seems to be, whether the arguments and facts stated in its favour are sufficiently strong to justify us in making it. Indeed, it appears to me that the reasoning might, with some propriety, be retorted against those who use it, by saying, "All punishments are but experiments to discover what will best prevent crimes; your favourite one of death has been fully tried. By your own account, all nations, since the first institution of society, have practised it, but you yourselves must acknowledge, without success. All we ask, then, is that you abandon an experiment which has for five or six thousand years been progressing under all the variety of forms which cruel ingenuity could invent; and which in all ages, under all governments, has been found wanting. You have been obliged reluctantly to confess that it is inefficient, and to abandon it in minor offences; what charm has it then which makes you cling to it in those of a graver cast? You have made your experiment; you have attended in its operation without any visible waste of human life, a depletion of the population, or any other

lect ; it was found often fatal to the innocent, and it very frequently permitted the guilty to escape. Nor can you complain of any unseasonable interference with your plan that may account for its failure : during the centuries that your system has been in operation, humanity and justice have never interrupted its course, you went on in the work of destruction, always seeing an increase of crime, and always supposing that increased severity was the only remedy to suppress it the mere forfeiture of life was too mild, tortures were superadded, which nothing but the intelligence of a fiend could invent, to prolong its duration and increase its torments ; yet there was no diminution of crime ; and it never occurred to you, that mildness might accomplish that which could not be effected by severity." This great truth revealed itself to philosophers, who imparted it to the people ; the strength of popular opinion at length forced it upon kings, and the work of reformation, in spite of the cry against novelty, began. It has been progressive. Why should it stop, when every argument, every fact, promises its complete success ? We could not concur in the early stages of this reformation ; perhaps the credit may be reserved to us of completing it ; and I therefore make no apology to the general assembly for having so long occupied them with this discussion. In imposing so important a change, it was necessary to state the prominent reasons which induced me to think it necessary, many more have weighed upon my mind, and on reviewing these, I feel with humility and regret how feebly they are urged. The nature of the subject alone will, however, create an interest sufficient to promote inquiry, and humanity will suggest arguments which I have not had sagacity to discover or the talent to enforce.

Having stated the reasons which induced me to discard all the different punishments which have been reviewed, I proceed to a short discussion of those which have been adopted. These are—

Pecuniary fines ; degradation from office ; simple imprisonment ; temporary suspension of civil rights ; per-

manent deprivation of civil right—negation of married labour; solitary confinement during the term of years of the time of imprisonment, or before or after the sentence.

The advantage of this scale of punishments is that it is divisible almost to infinity; that it is adapted to every, however slight, for which it does not seem to require a proportionate corrective, and none, however atrocious, for which by cumulating its different degrees, an adequate punishment cannot be found.

When to these are added the regulations which are made in certain cases, as to the nature of food and other comforts, during the term of punishment, which, in an almost perfect degree, the essential quality of being capable of apportionment, not only to any species of offence, but to every offender. Sex, age, habit, constitution, every circumstance which ought to determine the exercise of discretionary power, may have its proper weight.

Reformation of the criminal may reasonably be expected.

He is effectually restrained from a repetition of his crime.

A permanent and striking example is constantly operating to deter others.

The punishment being mild, public feeling will never enlist the passions of the people in opposition to the law.

The same cause will ensure a rigid performance of their duty by public officers.

Jurors, from a false compassion, will seldom acquit the guilty; and if by chance or prejudice they should convict the innocent, their error or fault is not as in the cases of infliction of stripes—permanent stigmas, or death—without the reach of redress.

These are advantages which render the penitentiary system decidedly superior to any other.

To detail the mode in which these different punishments are composed and applied to the different offences, would be to repeat the provisions of the whole book, which cannot be expected from the nature of this report, though

and I fear more than enough, has been said on this division of the work.

I proceed to the plan of the fourth book, which, as we have seen, is intended to give rules of practice in all criminal proceedings.

It regulates the mode in which complaints and accusations are to be made; designates the proper persons to receive them, and directs their duty in conducting the examination; taking the evidence on the complaint, and ordering the arrest; prescribes the form of warrants; and designates precisely the cases where arrests may be made without them. It prescribes minutely the duties, and defines the authority, as well of officers as of individuals, who assist them in making arrests.

It regulates the mode of conducting the examination, and the manner of making commitments, so as to avoid the frequent escapes of the guilty from the former defective practice on this head.

The manner in which the person is to be treated, during his confinement, is minutely detailed; provisions are introduced to prevent or punish all abuses of authority in those who arrest or have charge of the prisoner.

Rules are laid down for directing the discretion of the magistrate, and ascertaining his duties in admitting to bail.

The manner in which accusations, and the evidence to support them, are to be brought before the proper court, is distinctly described.

Rules are presented for the organization and mode of conducting business before grand juries. Their duties are defined, as are those of the public prosecutor, in presenting indictments before them.

The cases are distinguished which are to be prosecuted by indictment, from those in which information may be filed.

Rules are laid down for drawing acts of accusation, so as to secure a proper degree of certainty in the allegation of the offence, but to prevent the escape of the guilty from formal defects.

The mode of making the arrest of the accused; the pleading; the rules for conducting the trial; the powers of the judge; of the advocate for the accused; of the public prosecutor, in relation to it, are minutely worked out.

Regulations are made for summoning, excusing and challenging jurors, and for their government on the trial, and on the delivery of the verdict.

Directions are given for summoning and securing the attendance of witnesses.

The causes are designated for which judgment may be arrested and new trials granted, and all the proceedings subsequent to the verdict are provided for.

A chapter is dedicated to the regulation of the manner in which search warrants are to be granted and executed, and another to the designation of the cases in which security may be required against the commission of apprehended offences. Contempts are defined, and the mode of trying and punishing them is marked out.

The last chapter of this book contains a system of proceeding on writs of *habeas corpus*.

This chapter will be the first act of legislation in our state on this subject; important enough, it would seem, to have sooner engaged our attention. This writ was known in a remote period of the English law, but it was a precept without a sanction, and therefore totally inefficient until the statute passed in the 31st year of Charles II. gave it force and efficacy, and made it a feature in their jurisprudence, of which any nation might be proud, and which all ought to imitate or adopt. The mechanism of this admirable contrivance for securing personal liberty is so simple, its effects are so decisive, that we are led to wonder why it was not sooner put in operation, especially in a nation which at so early a period made it a stipulation with their king, that "no freeman should be imprisoned but by the law of the land." Indeed, the writ itself was known in the Roman law, by the name of *actio personalis liberatoria*, as it was called; but it was applied only to the case of a

freeman claimed as a slave ; and we do not find that even in that case there were any provisions to enforce its execution : on the contrary, there was one which permitted any person to refuse obedience, who chose rather to pay for the man, estimating his value as if he was a slave. In no stage of its history, therefore, was this writ of any importance until the spirit of liberty, nearly extinguished under the energetic despotism of the Tudors, rose superior to the weakness of the Stuarts, and inspired the declaration of those principles of personal and political rights on which our republics are chiefly founded. One of the most important measures which this spirit suggested, was the habeas corpus act ; it directs the manner in which the writ is to issue ; imposes penalties for disobedience to it, and makes a number of salutary provisions to prevent delays and abuses in criminal proceedings. In all the Atlantic states, this statute was a part of the law by which they were governed at the time they became independent ; and it was either expressly or impliedly adopted with the whole body of their municipal laws. In those states, therefore, nothing more was necessary than to guard against its suspension by a constitutional clause. But here the case was different ; the common law of England was not in force here, still less were its statutes. Neither could form part of our law, unless specially re-enacted. Yet the framers of our constitution, not attending to this difference, contented themselves with transcribing from the constitutions of other states, the provision that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." But no law had before, or has been since passed, defining what the writ of habeas corpus was, or directing the manner in which it was to be obtained, how it was to be executed, what was to be its effect, or what the penalty of disobeying it. If the writ alone be introduced without the provisions for enforcing it, it could be of as little use here as it was in England before the statute of

Charles II.; if the statute be introduced, do we stop at that of Charles? or are those of 16 George I. and 38 of George III. re-enacted by this laconic legislation? If either of them are, they involve, as applied to us, great absurdities: for they contain many provisions which are purely local, all of them referring to courts and to magistrates which do not exist under our laws; and impose penalties which are not recoverable here; and yet on which the whole efficacy of the act depends. So that whatever construction we put on this clause in our constitution, it must be confessed, that without some statute to define and enforce the great privilege of which it declares we shall not be deprived, the provision can be of little use. Hitherto the necessity for this remedy has been so strongly felt, that judges have not scrupulously examined their right to afford it; and even when improperly granted, so strongly is it supported by public opinion, that parties, though they have sometimes evaded its operation, have never thought proper to question its legality. It has held its authority, therefore, by the moral sense of the people, exerting its influence in support of an institution which they have been taught from their infancy to venerate and admire, rather than by the constraint of law. But times may come—in the natural progress of human affairs must come—when public opinion will have less force, and without the aid of law for its support, will prove a feeble barrier against encroachment.

The offences against personal liberty, which are most dangerous, are those that are committed for political purposes, and as the means of silencing opposition to unconstitutional and revolutionary measures. All the energies of the law, armed with its strongest sanctions, and directed by the most efficient measures to secure its execution, then become necessary. The magnitude of the evil, therefore, concurring with the probability of its occurrence, calls for the attention of the legislature to this important subject. In examining the different enactments on this point, collected from every source

of freedom must be grateful to its authors for the extensive, and it is devoutly to be hoped, the lasting benefit they have conferred on mankind. Ten millions of free-men have already consecrated it among their fundamental rights, and the rising republics of the new world will not fail to adopt so precious an institution, when they review and finally establish their constitutional compacts.

This is the greatest glory a wise nation can desire ; to see its principles recognized ; its institutions adopted ; its laws copied, not only by men speaking the same language, and bred in a similarity of manners, but translated into different languages, adapting themselves to different habits ; incorporated in different codes, and in all, acknowledged as the first of blessings. And the trial of a cause, by an independent jury, on the banks of the La Plata or the Oroonook ; or the writ of habeas corpus adopted by a representative assembly in Mexico and Peru, ought to afford more satisfaction to an Englishman, who loves the honour of his country, than the most splendid triumph of her arms. We must not, however, suffer our admiration of any institution to blind us to its faults or prevent us, when we are about to adopt it, from scrutinizing severely all its provisions, and carefully inquiring whether in its operation, defects have not been discovered, which a prudent attention might amend. In examining the English statute with this view, some important omissions have been observed : and in the project presented to you, an attempt has been made to remedy them. Some of the most important ought to be enumerated.

1. The great object of this writ ; that which constitutes its chief excellence, I may say its only use, is the promptitude and efficacy with which it acts. To borrow a phrase from another branch of jurisprudence, it is a writ for "specific performance," or it is nothing. In all civilized countries, there are actions given for injuries to personal liberty : but no nation, until England set the example, provided any means for the immediate cessation of the evil. This law enforces it by attachment, fines

and punish in most cases, as it has been found that the execution of such orders is often delayed or altogether neglected. The court has also the power to issue writs of habeas corpus, and to grant bail. A person may be imprisoned without trial, and his property seized by the government, but he is entitled to a hearing before the court. If the party to whom it is directed fails to appear, an insurrection return, no other process can be issued. That return has been received, although it is not to be sufficient, and then it is not accepted by process, but a penal one, which is awarded, not giving liberty to the prisoner, but punishing the party for his disobedience, who detains him. In the mean time the sufferer may be conveyed out of the kingdom, or some other irreparable injury may be inflicted on him. This is a case which must probably have often occurred in England, by abuses under their press warrants; by military encroachments, and for purposes of private vengeance or public oppression. Recent as has been the establishment of our government, an outrageous and well-known example of this abuse took place here; an evasive return was made and repeated, and while the court was occupied in determining its validity, a number of citizens were carried out of the state by a military officer, on a groundless charge of political crimes.

To prevent the occurrence of an evil of this kind, an article has been inserted, directing, whenever a case is made out to justify the issuing of this writ, accompanied by proof, that deportation, or any other irremediable injury is apprehended; or whenever the writ is disobeyed, that the magistrate shall, instead of the habeas corpus, issue his warrant to bring the prisoner, and the party in whose custody he is held, before him, that the one may be released and the other committed for trial, in all cases in which those steps may be required by law.

2. Under the English law, the return is taken for true, and the only remedy is an action against the person who

makes a false return; a doctrine utterly subversive of the true intent of the act, and which, in many cases, has rendered it nugatory. This doctrine was established on a reference to the twelve judges, by the house of lords, in 1757, and was enforced in the case of American seamen impressed on board of English vessels; the captain returned, that they had voluntarily enlisted, and without any other evidence, they were remanded to their slavery, and told, that if they survived the war, and could find any one to bring an action for a false return, on proving it, they might obtain relief. This glaring defect is removed by the law presented to you; and the mode is prescribed for examining into the truth of a return when it is controverted.

3. The judges in the case alluded to, determined unanimously, that the provisions made for awarding and returning writs of habeas corpus immediately, do not extend to any case but those of a criminal or supposed criminal nature. Mr Justice Bathurst, it is true, adds to his opinion, that although the statute did not extend to other cases, yet the justices of the king's bench had, in favour of liberty, extended the same relief to all cases.

To give full effect to this remedy, it is proposed expressly to extend it to every case of illegal imprisonment and restraint.

4. By the English practice, when a prisoner is brought up on habeas corpus, if the commitment be informal, he is discharged, although sufficient evidence may exist to justify his detention for trial. The plan proposes a remedy for this evil, by obliging the officer who brings up the prisoner, to produce the evidence on which he was committed, and directing the judge before whom the writ is returned, to re-commit him if the evidence warrant it.

As the whole of this chapter is submitted, it is not necessary to notice any other of the omissions which have been supplied, or the defects which it has been attempted to remedy. A strong impression of the utility of this

great writ, has rendered me particularly desirous to increase the facility of procuring it, to enable the people of its relief; to give an adequate notion of the provisions that are enacted; to display the utility of preserving it and the dangers which it is to be violated, and to show the value of juries, judges and other institutions of freedom, not by affecting to remain imperfect from a blind reverence for their antiquity, but by studying to improve, or at least to perfect them, and by leaving to our children not only unimpaired, but augmented, those privileges so granted to us by the wisdom and patriotism of our fathers.

The great objects in the execution of this division of the work, have been to protect the innocent from ill-founded prosecutions, and even the guilty from vexation, in the manner of conducting those which were necessary to ascertain their guilt. But at the same time, to insure the exact execution of the laws, and as far as possible to destroy the effect of those devices which professional ingenuity has so frequently used to procure the escape of the guilty. Some new provisions have been introduced to effect these objects, but where they could be obtained without innovation, none have been proposed. In those cases my endeavours have been confined to the arrangement of the law applicable to the different divisions, under its proper heads; and to giving precise and intelligible language to the rules of procedure. Even a slight notice of all the points in which changes or modifications of the present law have been suggested, would extend this report, already too long, to an inconvenient size. It may not be amiss, however, to mention a prohibition of those charges, which the judge frequently uses as the means of diffusing his political tenets, displaying his eloquence, and sometimes gratifying his passions; and of those presentments of the same nature, by which the jury recommend candidates to office, denounce public measures, or eulogize the virtues of men in power; such proceedings were thought beneath the dignity of the magistrate, and inconsistent with the sanctity of that

body, whose functions of public accusers, and guardians of the liberty and reputation of their fellow-citizens, require calm investigation, undisturbed by intemperate discussions. If an ordinary court of justice be properly called the temple of that high attribute of the deity, we may, without too far extending the metaphor, term the tribunal of criminal jurisdiction, a shrine in that temple; the holy of holies, into which impure or unworthy passion should find no admittance, and where no one ought to officiate until he has put off the habits of ordinary life, and assumed, with the holy robes of his function, that purity of intention, that ardent worship of truth, so inconsistent with the low pursuits of interest, the views of ambition, or the vanity of false talent. Party spirit unfortunately will, in some degree, influence every other department; from the nature of our government it must exist, but it will do no material injury, while it is felt in the legislative, or even in the executive branches; but if it once find admittance to the sanctuary of justice, we may be assured, that the vitals of our political constitution are affected, and I can imagine no better means of facilitating this corruption, than permitting your judges to make political harangues to a jury, who reply by a party presentment.

Another article applicable to the trial, restricts the charge of the judge to an opinion of the law, and to the repetition of the evidence, only when required by any one of the jury: the practice of repeating all the testimony from notes, always (from the nature of things) imperfectly, not seldom inaccurately, and sometimes carelessly, taken, has a double disadvantage; it makes the jurors, who rely more on the judge's notes than their own memory, inattentive to the evidence; and it gives them an imperfect copy of that, which the nature of the trial by jury requires they should record in their own minds. Forced to rely upon themselves, the necessity will quicken their attention, and it will be only when they disagree in their recollection, that recourse will be had to the notes of the judge. There is also another and more cogent

reason for the restriction. Judges are generally men who have grown old in the practice at the bar. With the knowledge which this experience gives, they also acquire a habit, very difficult to be shaken off, of taking a side in every question that they hear debated, and when the mind is once enlisted, their passions, prejudices, and professional ingenuity are always arrayed on the same side, and furnish arms for the contest. Neutrality cannot, under these circumstances, be expected; but the law should limit, as much as possible, the evil that this almost inevitable state of things must produce. In the theory of our law, judges are the counsel for the accused, in practice they are, with a few honourable exceptions, his most virulent prosecutors. The true principles of criminal jurisprudence require that they should be neither. Perfect impartiality is incompatible with these duties. A good judge should have no wish that the guilty should escape, or that the innocent should suffer; no false pity, no undue severity should bias the unshaken rectitude of his judgment; calm in deliberation, firm in resolve, patient in investigating the truth, tenacious of it when discovered; he should join urbanity of manners to dignity of demeanour, and an integrity above suspicion, to learning and talent; such a judge is what, according to the true structure of our courts, he ought to be—the protector, not the advocate of the accused; his judge, not his accuser; and while executing these functions, he is the organ by which the sacred will of the law is pronounced. Uttered by such a voice, it will be heard, respected, felt, obeyed; but impose on him the task of argument, of debate; degrade him from the bench to the bar; suffer him to overpower the accused with his influence, or to enter the lists with his advocate, to carry on the contest of sophisms, of angry arguments, of tart replies, and all the wordy war of forensic debate; suffer him to do this, and his dignity is lost; his decrees are no longer considered as the oracles of the law; they are submitted to, but not respected; and even the strength of his eloquence or ingenuity, in the prosecution of the

accused, must be lessened by the suspicion, that it has owed its success to official influence, and the privilege of arguing without reply. For these reasons the judge is forbidden to express any opinion on the facts which are alleged in evidence, much less to address any argument to the jury; but his functions are confined to expounding the law, and stating the points of evidence on which the recollection of the members of the jury may differ.

I pass over other alterations of less importance, and proceed to the consideration of the fifth book.

This, as we have seen in the plan, is devoted to the rules of evidence as applicable to criminal law. In the execution of this part of the work, general principles will be first laid down, applicable to all cases of criminal inquiry, from its incipient to its final stage; they will be such only as have received the sanction of the learned and the wise, or such as can be supported by the clearest demonstration of their utility and truth. The evidence necessary to justify commitments, indictments, and convictions for each offence specified in the third book, as well as that which may be admitted in the defence, will be detailed under separate heads, and such an arrangement will be studied as to make this part of the work easily comprehended, and remembered without difficulty.

It is obvious, from the nature of this division of the subject, that illustrations of the rules it contains cannot be given without greatly exceeding the limits of an ordinary report. It may be proper, however, under this head, to notice that an attempt is made to enforce the sanction and add to the solemnity of oaths. From the careless and often unintelligible manner in which they are administered, it seems an idle ceremony rather than a sacred promise, accompanied by a renunciation of the blessings of the deity in case it should be broken. Rules are framed on this subject, which it is supposed may, in some measure, correct the evil, and make witnesses more cautious and circumspect in their testimony, by impressing upon the mind a proper sense of the serious consequences of its violation. If this impression should be

For this purpose I intend, if possible, to devote a few months of the summer to a personal examination of the different institutions of the kind in the Atlantic states ; but if my circumstances should not permit me to execute this plan, I shall renew the efforts I have already made to procure the information which the different returns and reports can give.

Every system having reformation for its principal, or even incidental, object, is imperfect, if it do not contain a regular and permanent provision for giving education to the young offenders, and moral and religious instruction to all.

Lessons of this nature, inculcated by men of piety and benevolence ; enforced by a life of temperance and labour, and not counteracted by any evil associations, I firmly believe, will make many a discharged convict a more worthy member of society than some who have never committed any offence of sufficient magnitude to incur the same discipline. But reformation is not enough ; although sincere, it will not be lasting, if the distrust of society shall drive the repentant sinner from its bosom, deny him the means of subsistence, and force him to seek it in a new association with his former companions in guilt. To avoid this consequence, means must be found to test by a proper interval of probation the sincerity of his reformation ; to give him an opportunity of regaining confidence, by acts of gradual intercourse with the public, and, after repeated trials, if it be found that he can withstand temptation, to assign him a place in society, which will enable him to subsist without reproach.

This part of the plan will be difficult of execution, but it is not deemed impracticable, and it will be facilitated and enforced by increased severity for a repetition of offences, as well in the duration of punishment as in the increase of privations while it lasts. Should the regulations which I suggest for this purpose be adopted, and be found efficient, it will complete the system which substitutes amendatory to vindictive punishments. A reformation in penal jurisprudence which reflects higher honour

on modern times, than the *Principles of Penal Law* produced in arts, literature, or science.

This is the plan of the work, and the principles on which it is founded. It is not, however, it should be perceived, that the *Principles of Penal Law* are the views of the legislator, or the views of the public, but of the expectations of the civil and political community, of such remedy as their wisdom may require.

From such parts of the code as are, to the greatest forwardness, I have selected *Principles* and *Practical*, and the last chapter of the fourth is prepared for the execution. The one being chiefly an enunciation of general principles, and the other more closely confined to matters of practical detail, the general assembly can the better judge, whether a proper attention to each of the two has been combined with efficient practical detail, and whether the great object I have had in view, of rendering every rule intelligible, though concise, has in a reasonable degree been attained.

Some parts of the third book are prepared, but the whole of this division is still in an unfinished state. The fourth is nearly complete. The fifth cannot, without great inconvenience, be put into form until the crimes to which the evidence is to apply are defined and definitively classed; this book must, therefore, necessarily be unfinished until the completion of the third; and the want of that information, which I hope to obtain by a personal inspection of the prisons, has unavoidably delayed what I have to add to the sixth and last book.

I have only to add, on this subject, that from the progress already made, I hope that the whole system will be presented at the next session. And I submit to the legislature, whether it would not be proper to direct, that when finished it shall be printed for the inspection of the members.

* This report was made before the completion of the "System of Penal Law," the publication of which now renders the insertion of these special provisions unnecessary.

This report is intended to apprise the representatives of the people what changes are proposed to be made in their criminal jurisprudence ; to inform them why these changes are deemed necessary ; to lay before them a plan of the whole work ; to announce the principles on which it is established ; and by the exhibition of a part, to show in what manner it may be reasonably expected that the whole will be executed.

In performing this duty, the line traced by the law under which I was appointed, has been scrupulously adhered to. In its execution, I claim no other merit than that of diligence, and a most conscientious desire to perform it in such a manner as will best reconcile humanity with justice, and the great interests of freedom with both.

The representatives of a free people, although they may do nothing to forfeit the confidence of their constituents, cannot always expect to retain the power of serving them. A spirit of change is inherent in our government ; it gives it energy, and is even necessary to its existence. We appear in public life ; perform or neglect the duties assigned to us ; and then, pushed off the stage by younger, more active, or more popular candidates, we return to the mass of our fellow-citizens ; in common with them, to suffer the evils or enjoy the benefits of the measures we have adopted. It is not always that, in the brief space allotted to us for the performance of our functions, we have an opportunity of making it an epoch in the annals of our country, by institutions, with which a grateful posterity will identify the names of those by whose patriotic labours they were established. This rare occasion now presents itself for your acceptance.

If the work which your wisdom has directed, and which your sound judgment, experience, and care will modify and correct, should effect the object of giving to your country a penal code, founded on true principles—concise, correct, humane, easily understood, guarding with the same scrupulous care the rights of the poorest citizen

and of the most influential member of society : enforcing firmly, not harshly, a strict obedience to the laws ; repressing with an even hand the abuses of office and the license of insubordination : protecting the good, restraining, punishing, and reforming the wicked : arraying the best feelings and most powerful passions, as well as the understanding on the side of the law ; making disobedience unwise and unattractive, as well as dangerous ; arming all your institutions with public opinion, and directing its irresistible force against vices and crimes ; rendering your judges venerated as the oracles of justice, and your courts respected as its sanctuary. Should this be the result, few public bodies can boast a fairer claim than you will then have to the approbation of their constituents and the gratitude of posterity. For you will have rendered an essential service, not only to your own country, by securing its internal peace, and establishing its reputation for wisdom and justice, but to the other states, by giving them an useful and honourable example, and to the whole world, by demonstrating the ease and safety with which abuses are corrected and improvements introduced under a free government, and exemplifying its superiority by this proof of the rapid progress it has enabled you to make in the science of legislation, during the few years you have enjoyed it. And the grateful prayers of the innocent whom you will have saved, of the guilty you will have reformed, and of the whole community whose feelings will no longer be lacerated by public exhibitions of suffering and of death, will combine, with your own consciousness of rectitude, in drawing down a blessing on your lives, and diffusing a glow of happiness over that hour, when the remembrance of one measure effected for the interests of humanity or the permanent good of our country, will be of more value than all the fleeting and unsatisfactory recollections of success in the pursuits of fortune or ambition.

All which is respectfully submitted.

EDWARD LIVINGSTON

INTRODUCTORY REPORT
TO
THE SYSTEM OF PENAL LAW,

PREPARED FOR
THE STATE OF LOUISIANA.

in search of amendment. Not a single amendment offered, that has not been adopted without a vote of opinion, when it brought consideration to the point, and the long list of corrections in the corrected printed copies, attest how slight my attachment was to the preconceived ideas, or to the language in which they were expressed, when either my own reflection or the advice of others, convinced me that they might be amended. The codes, as they are now presented, have been produced by the exercise of my best faculties, faithfully and laboriously employed, under the direction of a religious desire to perform the high duty entrusted to me, so as, in some degree, to realize the great views of those by whom I was appointed.

Cheered and encouraged in the very outset of the work by the approbation which the general assembly bestowed on the plan and the specimens which accompanied it, I proceeded with alacrity in the execution of my task; and in its progress, had the satisfaction to receive testimonials equally calculated to stimulate my exertion. Some of them I have obtained leave to communicate with this report. They all concur in the utility of the projected reform. Some speak in the highest style of encomium on the honour the state has acquired by leading the way in effecting it; and when the high terms, in which the friendship of some, and the politeness of others, have induced them to speak of the execution of the work, are reduced to their just value, most of them contain reflections that will be found of great use in the discussion of the codes.

Well aware of the difficulties of my task, but feeling a conviction that they were not insurmountable, I undertook it with so much confidence as was necessary to sustain me in its execution; but with that distrust of my own powers, which made me submit to the test of long reflection and severe scrutiny every principle I laid down and every provision intended to give it effect. I made these my leading rules—to adopt no theory, by whatever specious argument supported, until I should be convinced

of its practical utility ; diligently to seek for information, but to admit nothing upon the mere authority of high names, to make no unnecessary innovation, but boldly to propose every change I should think practicable and useful. This process unavoidably consumed much time ; but, by assiduous labour, in little more than two years after my plan had received the sanction of your predecessors, I had completed the work. Its destruction in the autumn of the year 1824 was communicated to the general assembly, and produced a resolution giving me another year to renew it. This was to be done entirely from recollection, for not a written vestige of my former labour remained ; and the task of recomposition, always irksome, was interrupted and rendered more difficult by the interference of engagements, which, supposing my undertaking finished, I had made for the ensuing year. These circumstances, while they afford a reason, and perhaps an excuse for delay, will render negligent error more unpardonable.

The enunciations of fact as well as of principle, contained in the law under which I have acted, and the resolution approving of the plan which was prepared in conformity with its provisions, might seem to preclude the necessity of saying anything to show that a reform in our criminal jurisprudence was called for, or that the directions contained in the law were proper in order to effect it. But when it is considered, that the general assembly has been twice changed since those acts were passed, and that all the enemies of reformation have been industriously at work during that period in urging arguments against the contemplated change, it may not be deemed, I hope, improper to attempt, in this report, a refutation of arguments and a disproof of allegations calculated to mislead, and to perpetuate the degrading state of subjection to unwritten, and therefore necessarily unknown laws.

The law of 1820 recites, "that it is of primary importance in every well regulated state, that the code of criminal law should be founded on one principle—the

parts of the penal law of the different nations by which this state, before its independence, was governed

“To embody into one law and to arrange into system such of the various prohibitions enacted by different statutes as are proper to be retained in the penal code.

“To include in the class of offences, acts injurious to the state and its inhabitants, which are not forbidden by law.

“To abrogate the reference, which now exists, to a foreign law for the definition of offences and the modes of prosecuting them.

“To organize a connected system for the prevention as well as for the prosecution and punishment of offences,

“To collect into written codes, and to express in plain language, all the rules which it may be necessary to establish, for the protection of the government of the country, and the persons, property, condition, and reputation of individuals; the penalties and punishments attached to a breach of those rules; the legal means of preventing offences, and the forms of prosecuting them when committed; the rules of evidence, by which the truth of accusations are to be tested; and the duties of executive and judicial officers, jurors, and individuals, in preventing, prosecuting, and punishing offences: to the end that no one need be ignorant of any branch of criminal jurisprudence, which it concerns all to know.

“And to change the present penal laws in all those points in which they contravene the following principles, which the general assembly consider as fundamental truths, and which they have made the basis of their legislation on this subject, to wit:

“Vengeance is unknown to the law. The only object of punishment is to prevent the commission of offences: it should be calculated to operate—

“First, on the delinquent, so as by seclusion to deprive him of the present means, and by habits of industry and temperance of any future desire, to repeat the offence.

“Secondly, on the rest of the community, so as to

deter them, by the example, from a like contravention of the laws. No punishments greater than are necessary to effect these ends ought to be inflicted.

"No acts or omissions should be declared to be offences, but such as are injurious to the state, to societies permitted by the laws, or to individuals.

"But penal laws should not be multiplied without evident necessity; therefore acts, although injurious to individuals or societies, should not be made liable to public prosecution, when they may be sufficiently repressed by private suit.

"From the imperfection of all human institutions, and the inevitable errors of those who manage them, it sometimes happens that the innocent are condemned to suffer the punishment due to the guilty. Punishments should, therefore, be of such a nature that they may be remitted, and, as far as possible, compensated, in cases where the injustice of the sentence becomes apparent.

"Where guilt is ascertained, the punishment should be speedily inflicted.

"Penal laws should be written in plain language, clearly and unequivocally expressed, that they may neither be misunderstood nor perverted; they should be so concise as to be remembered with ease, and all technical phrases or words they contain, should be clearly defined; they should be promulgated in such a manner as to force a knowledge of their provisions upon the people; to this end, they should not only be published, but taught in the schools; and publicly read on stated occasions.

"The law should never command more than it can enforce. Therefore, whenever from public opinion, or any other cause, a penal law cannot be carried into execution, it should be repealed.

"The accused, in all cases, should be entitled to a public trial, conducted by known rules, before impartial judges, and an unbiassed jury; to a copy of the act of accusation against him; to the delay necessary to prepare for his trial; to process to enforce the attendance

of his own witnesses ; and to an opportunity of seeing, hearing, and examining those who are produced against him ; to the assistance of counsel for his defence ; to free communication with such counsel, if in confinement, and to be bailed in all cases, except those particularly specified by law. No presumption of guilt, however violent, can justify the infliction of any punishment before conviction, or of any bodily restraint greater than is necessary to prevent escape ; and the nature and extent of this restraint should be determined by law.

“Perfect liberty should be secured of hearing and publishing a true account of the proceedings of criminal courts, limited only by such restrictions as morality and decency require ; and no restraint whatsoever should be imposed on the free discussion of the official conduct of the judges, and other ministers of justice, in this branch of government.

“Such a system of procedure, in criminal cases, should be established, as to be understood without long study ; it should neither suffer the guilty to escape by formal objections, nor involve the innocent in difficulties by errors in pleading.

“For this purpose, amendments should be permitted in all cases, where neither the accused nor the public prosecutor can be surprised.

“Those penal laws counteract their own effect, which, through a mistaken lenity, give greater comforts to a convict than those which he would probably have enjoyed while at liberty.

“The power of pardoning should be only exercised in cases of innocence discovered, or of certain and unequivocal reformation.

“Provision should be made for preventing the execution of intended offences, whenever the design to commit them is sufficiently apparent.

“The remote means of preventing offences do not form the subject of penal laws. The general assembly will provide them in their proper place. They are the diffusion of knowledge, by the means of public education, and

the promotion of industry, and consequently of ease and happiness, among the people.

"Religion is a source of happiness here, and the foundation of our hopes of it hereafter; but its observance can never, without the worst of oppression, form the subject of a penal code. All modes of belief, and all form of worship, are equal in the eye of the law; when they interfere with no private or public right, all are entitled to equal protection in their exercise.

"Whatever may be the majority of the professors of one religion or sect in the state, it is a persecution to force any one to conform to any ceremonies, or to observe any festival or day, appropriated to worship by the members of a particular religious persuasion: this does not exclude a general law, establishing civil festivals or periodical cessations from labour for civil purposes unconnected with religious worship, or the appointment of particular days on which citizens of all persuasions should join, each according to his own rites, in rendering thanks to God for any signal blessing, or imploring his assistance in any public calamity.

"The innocent should never be made to participate in the punishment inflicted on the guilty; therefore, no such effects should follow conviction, as to prevent the heir from claiming an inheritance through, or from, the person convicted. Still less should the feelings of nature be converted into instruments of torture, by denouncing punishment against the children, to secure the good conduct of the parent.

"Laws intended to suppress a temporary evil should be limited to the probable time of its duration, or carefully repealed after the reason for enacting them has ceased."

These different expressions of legislative opinion would seem to preclude the necessity of any argument to show the defects of our present system of penal law, or to establish the truth of the principles upon which the proposed amendments are founded. But as I have taken pains for the foundation of all my statements, utility for

the sole object of my provisions, and reason alone as the means of supporting my conclusions, I shall not take shelter behind any authority ; but shall endeavour, in this report, to show that the legislative declaration of the defective state of our penal law is founded in fact, and that the principles they prescribed to remedy the evil were founded in wisdom and practical truth. This will be not only useful but necessary to the proper consideration of the reports, in which the attention of the legislature is called to the principal enactments in the different codes offered for their consideration. For, without this previous discussion, they cannot determine whether those provisions remedy the existing evils, or whether they are in unison with each other and with the sound doctrines of penal jurisdiction on which they purport to rest. If the proposed system cannot be supported by reasons showing that it is both practicable and useful, it ought not to be adopted ; but let no part of it be rejected on the authority only of influential names ; still less by the affected doubts of interested, or the errors of sincere prejudice.

In this report, then, I propose to show THE NECESSITY OF A REFORM, FROM A VIEW OF THE ACTUAL STATE OF OUR PENAL LAWS, and to answer the objections that have been made to the establishment of a written system.

The objects of penal law are : to define offences, to prevent their commission, and to designate and direct the mode of inflicting the penalty when they are committed. To effect these objects, there must be rules established by legislative authority. Those rules must be known ; and, to be known, they must be promulgated. But the rule can neither be made, nor be known, nor promulgated, unless it be clothed in words. Are those words to be oral or written ? is the first question. A strange one, it would seem, in our state of society, yet seriously made ; seriously answered in favour of traditional against written law—made and answered by lawyers, by judges, by men whose situation gives influence, and whose opinions have weight. Such are the

advocates for retaining the reference to that part of the English common law which forms a part of our criminal jurisprudence. That part is not inconsiderable : it pervades the whole mass of our legislation on this subject : and it is necessary to understand this, that we may know how to value the argument which asserts that our statutes, not the English common law, defines offences and imposes the penalties. This is not the fact. The groundwork of our pénal law is the territorial statute of 1805. It enumerates the offences and indicates the penalties ; but it does not define. Theft, burglary, murder, and other crimes, are made punishable. But if we want to know what theft, or murder, or any other offence on the list is ; if we wish to know what means we may use to prevent either of these crimes ; how the offender is to be arrested, how confined, how bailed, how tried, what evidence can be admitted, what is required for conviction : for all these, and an hundred other questions equally important, we are referred to the *common law of England* ; that is to say, what one of its greatest panegyrists styles, “the *unwritten or common law*,” consisting of “*general customs*”—of *particular customs*—and of “*certain particular laws, which by custom are adopted and used by some particular courts* :” the whole resting, as we see, upon *custom*. And when we come to inquire how these “customs” are to be known, the same author gives the answer, “by the judges ;” who, he says, “are the depositories of the laws, the living oracles who must decide in all cases of doubt,” &c. Here, then, we see what is our law. It is “the unwritten customs of England,” which, from the same authority, we are told, it requires twenty years of close study for a judge to understand ; and which, without fear of incurring the charge of presumption, I will add, no man ever did or ever can understand—for this plain reason : that, in many instances, it does not exist, until the case arises which calls for its application ; then it is pronounced, not by the legislative authority, but by one of these living oracles. It is a maxim with English lawyers, that the common

law is the perfection of human reason. No case, therefore, can be supposed to be unprovided for by it, and, consequently, whenever any new case occurs, and no preceding response has been given that will fit it, the judge must create one; and although it has never before been spoken, or written, or applied, we must believe it, from time immemorial, to have been a part of the common law; that is to say, as we have just seen, the *custom* of England: which involves the absurdity of supposing that to have been of immemorial usage, which we know was never before practised or heard of.

But this is not the only difficulty or absurdity attending a reference to the common law. These oracles, it must be remembered, are not given like those of the sybil, in writing—but like most of those of antiquity, orally. The judge seldom or never writes his decision. The words of inspiration are caught by the reporter, and he publishes them. Here, it would be supposed, an opportunity is afforded of knowing, with some certainty, what the law is. To the people? No! The size, the number, the price, and the disgusting verbosity of the volumes forbid it. To the lawyers, then, at least? Not even to them! The same causes operate to prevent many of them from examining more than an index or abridgement; but even the few who are rich enough to buy, and have had leisure to examine, those repositories of the law, with reference to a single point, for a general study of them would consume the longest life, even on that single point will find themselves sadly mistaken if they look for a certainty. Hear what Blackstone—I take my authority only from professed admirers of this system—hear what he says of the credit that is to be given to these reports:—"From the reign of Henry the eighth to the present time, this task (that of reporting) has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very *crude and imperfect, perhaps contradictory, accounts of one and the same determination*."

Admit, then, that the judge pronounces the true precept of law, we can have no security that it is truly recorded, and a word omitted or tampered, may alter the whole sense of the rule. But this is not all. Let us suppose the record to be truthfully made, what is to be its effect? Is it binding on future judges, in similar cases? In other words is it law? What say our oracles on this important question? Blackstone tells us, "it is an established rule to abide by former precedents but with some exceptions; which are, first, when the precedent is evidently contrary to *reason*; secondly, when it is clearly contrary to the *divine law*; thirdly, which seems to be included in the first, when it is *flatly absurd or unjust*." This is the doctrine of the text. Christian, the able commentator on this justly distinguished book says, on the contrary, "precedents and rules must be followed even when they are *flatly absurd and unjust*, if they are agreeable to ancient principles" and he gives an example which places the justice of this admitted system in a most striking point of view. It is a maxim of the common law, that all statutes, whenever passed, refer to, and take effect from, the first day of the session of parliament. Now, to exemplify his rule, he says, if a statute should have been passed on the last day of the session, making an act a capital offence which before was innocent, any one who had done that act between the first and the last day of the session, that is to say, perhaps six months before it was made an offence, would have been condemned and executed under the law. "This," he adds, and everybody must agree with him, "was flatly absurd and unjust;" but yet no judge could declare that it was not law; and this absurdity and tyranny, worthy of a Nero or Caligula, continued to form a part of the "perfection of human reason" until the year 1793 (a), when one step in the road to common sense was made by enacting that the statute should not be in force before it was made, but gave it effect, when it contained no special

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(a) Statute 33 Geo. III. c. 13.

provision on the subject, from the day on which it *passed*, without any attention to the time in which it was known by promulgation ; so that even at this day, in England, according to the common law, a man at a distance from the seat of government may be punished for doing an act which, in the nature of things, he could not know to be illegal.

Thus the general assembly may form some idea of the nature of that law, to which our present system of criminal proceedings refers us for the definition of certain offences, and for the rules for preventing, trying, and punishing them. We see that it consists of unwritten rules, promulgated by the judges by precedents often incorrectly reported ; of uncertain authority when known ; to be followed, according to some writers, however unjust or absurd ; and, according to others, to be modified by the principles of *reason* and the *divine law*, that is to say, by the caprice, or the bigotry, or the enthusiasm of the judge. What more uncertain rules can be referred to than *human reason* and the dogmas of religion ? What may appear reason to one, is folly to another ; and on no one subject does the mind of man take so wide a range as in imagination respecting the divine will.

But if no other objection existed, that which is contained in its very definition, would, it appears, be sufficient to ask for the substitution of some other ;—it is *unwritten*. If we like its other provisions (and very many of them are excellent) let us, at least, destroy that characteristic, by reducing them to writing.

Two contradictory objections are commonly raised to this most important operation : the one, that the task is impracticable—that the body of the common law can never be reduced to writing ; the other, that its rules are already written, and that a reference to the reporters and commentators will give a sufficient knowledge of its provisions. Now, of these two opinions, one only can be true ; and if either be true, it presents a state of things that no reasonable being can wish to see continued. If all the precepts of the common law cannot be reduced to

writing, then a part of them are not contained either in the reporters or other writers, to which we are usually referred. Where are we, then, to find this unrecorded part?—in the unexplored mind of the judge? When is it to be promulgated? for the first time after the case has occurred to which it is about to be applied? And who is to record or remember it—what is to be its effect and authority—in our state, which of the seven independent judges is to be considered as pronouncing the true oracle when they differ? Can principle be more completely abandoned; can common sense and common justice be more effectually lost sight of—can confusion be worse confounded than by this state of things? Take the other alternative. The precepts and principles of the common law are already reduced to writing. But where are they to be found? In voluminous reports which it requires great diligence to collect, very large sums of money to purchase, a long life to read (*et*), and a superhuman intellect to understand and reconcile with each other when they are read! They are to be found in commentaries on, and abridgements of, these reports, scarcely less voluminous; in which precedents and arguments may be found for almost every position that may be taken by sophistry, or required for an indiscriminate defence of right and wrong; add to this, that these sources of information are inaccessible to three-fourths of the inhabitants of this state, being written in a language which they cannot understand; and that of the other fourth, a very few only have the time or the means of applying to them; and you have a state approaching to that which has been justly designated as a badge of the most abject slavery, one governed by unknown and uncertain laws.

(*a*) If in the days of Fortescue twenty years of hard study (*viginti annorum lucubrationes*) were required to understand this law, then in its primitive simplicity, it is not unreasonable to calculate that the necessary term must be quadrupled by the reports, commentaries, folio abridgements, books of entries, essays and treatises of practice, which have accumulated in the four centuries that have since elapsed.

But even this, bad and absurd and oppressive as it is, this is not the worst. The words of our statute which refer us to this rule, call it the *common law of England*. Now this common law being established in a succession of very remote ages, when manners, religion, society and government were in a totally different state from that in which every succeeding period found them, it necessarily happened that positive laws were made to accommodate it to the change of circumstances. Some of these changes were made at so remote a time, that the most learned antiquary would find it impossible to fix the point in any one given subject where common law first received the aid of positive enactment; in other words, to tell us what is *common*, what is *statute* law. And yet we must at our peril know this, for the first is our rule of action; with the second we have nothing to do. Common sense alone would show the necessity of this research, but being so happy as to find it supported by authority, I gladly avail myself of both. We have reports of cases in penal law for about three years only; and we have them during that period, because the same court, of which the decisions were reported, then had criminal as well as civil jurisdiction. Property, it seems, has not only here, but in most other countries, been considered of so much more consequence than reputation, liberty, or life, that while all decisions that in the slightest degree affect the former are collected, those which involve the latter are generally consigned to oblivion; or, in particular cases, obtain an ephemeral publicity in the gazettes. The reason of this will be hereafter discussed. It is here mentioned only to account for the very scanty means we have of collecting authorities on these important points. But in that short period to which I refer, a decision took place which fully supports my position:—B. was indicted for forging the name of another, as an endorsement on a promissory note. The person whose name was supposed to be forged was called as a witness; he was objected to as being incompetent by the common law; and many authorities were produced, showing that in England such witnesses

had been rejected. It was answered, that by the common law he was a good witness, that the decisions relied on as authorities were made since a statute passed in the reign of queen Elizabeth, which had indirectly effected a change in the common law. Of this opinion was the court, and the witness was sworn (a). From this it appears that the English authorities were rejected because they were founded on a change made in the common law by a statute; consequently that the act of 1805 refers to the common law, unamended by statute. The first evil resulting from this, is that to which I have alluded; the necessity of drawing, in every contested case, the line between the statute and the common law. Supposing this difficult task to be accomplished, and that we have reduced the latter to its primitive simplicity by stripping off the statutory shreds and patches by which it was disguised or adorned, what have we to reward us for our pains? First, we have the *benefit of clergy* (b), which assures impunity to every one who can read, for none of our statutes have taken it away. Next, the right of *appeal* in felony, and, as a consequence of appeal, the trial by *ordeal and battle*; for although you have established the trial by jury, so had the common law, and much in the same manner that you have done, at the option of the party(c). You have the right of *sanctuary*,

(a) 1 Mart. Rep. 214.

(b) Should it be objected that our statute, by directing the punishment of death to be inflicted, abolishes the privilege of clergy; it is answered, that the same statute introduces the common law which also directed the punishment of death, but admitted the privilege of clergy as an exception. If then, the rule and the exception could exist together under the common law, why can they not under our statute?

(c) The same statute that gives us the trial by jury, at the option of the party, declares that "the method of trial" shall be according to the said "common law;" but the said common law allowed both the trial by battle and the trial by jury—and the former has been demanded in our own day in England, to the great perplexity and astonishment (very probably) of the lawyers, as *Spelman* says was formerly the case—*non sine magna juris consultorum perturbatione*. It has, within a few years, been abolished by statute.

by which every offender who can escape to a church or a churchyard is privileged from arrest, and may *abjure the realm*. You have the right of *approvement*, by which any criminal who can in a judicial combat knock out the brains of his accomplice, secures his own pardon. You have the whole doctrine of outlawry, and other incidents to criminal proceedings, which no advocate for the present state of things either understands, or would venture to contend for if he did; but which they cannot avoid and must learn, and must practise, if the law is to be executed according to its plain letter. The judges, therefore, must dispense with it, and do this to the degree only that they think fit in each case. The court, not the general assembly, must legislate, and they must legislate after the fact! (a)

In offering these reflections, it is not intended to excite prejudice against, or pass an indiscriminate censure on the common law of England. On the contrary, it will be seen that many of its provisions are transferred into the system which has been prepared; and that among them so taken from that law, are those which the most effectually secure liberty, reputation and property. But the subject is discussed to show that your predecessors were well founded in the assertion, that our present laws being neither certain nor accessible, were defective in at least two of the essential requisites to a good system.

The next defect in our present laws was that which the legislature had in view, when they declared that one object of the projected code was, to "remove doubts relative to the authority of any parts of the penal law of the different nations by which this state, before its independence, was governed." Were there any such doubts, and if there were, ought they to be removed? It is an established rule of national law, that on the transfer, or conquest of a country, the municipal laws remain in force until they are expressly changed by the new govern-

(a) Our constitution has very wisely guarded against *ex post facto* legislation by the general assembly. Was it intended that the judiciary should exercise it?

ment (c). When the treaty of 1763 by which Louisiana was ceded by France to Spain was carried into effect in 1769, the latter power acted on this principle, and solemnly promulgated its own laws (d). France, when that power in 1803 received the actual transfer of the country from Spain, in execution of the treaty of St. Ildefonso, took only a temporary and provisional possession, in order to deliver it to the United States according to the provisions of the treaty of Paris. No material alteration was made in the laws by this operation.

The first act of sovereignty done by the United States after the cession, was in perfect accordance with the principles laid down. For the law which authorized the president to take possession of the province (e), recognizes the force and validity of the existing laws, by vesting in officers to be appointed by the president *the same* military, civil and judicial powers that were exercised under the Spanish government. The province continued under its old laws, administered by new functionaries, from the time of the transfer in December 1803, until the 1st of October 1804, when the law giving us the first grade of territorial government (f) took effect. This act organized the executive, legislative and judiciary branches of a territorial government. It extended to the territory the operation of certain laws of the United States, fixed the qualifications of jurors, and secured the right of trial by jury, and gave the writ of habeas corpus; but so far from repealing any of the former laws, it contains an express provision that all laws in force in the territory at the passage of the act, and not inconsistent with it, should continue in force until altered, modified, or repealed by the legislature.

The next change in the political organization of the territory produced none in our civil or penal laws, the

(a) 1 Black. Com. 107; Cowp. Rep. 204.

(b) O'Reilly's Pro. 1769.

(c) Act of 31st October 1803.

(d) Act passed 26th March 1804, to take effect 1st October following.

act giving us the second grade of government (*a*) containing the same clause for continuing them "until altered, modified, or repealed by the legislature." And when the trammels of territorial government were thrown off, our constitution carefully preserved the same provision (*b*). Thus by uninterrupted succession, the laws by which the Spanish province of Louisiana was governed, with the exception only of such as were inconsistent with the several enumerated acts, were continued through all the different changes of government, and unless since repealed, altered or modified, are the law of the land at this day. That the penal laws formed no exception is evident from the general words which comprehend them, and also from some of the earliest acts of the legislative council, which recognize them in express terms.

One of the first laws passed by the legislative council (*c*) declares, that "whenever a conviction had taken place or *might take place*, for any crime which by the *existing laws of the territory* would subject the criminal to be sentenced to the galleys for life, that such punishment might be *commuted*," &c Now as no penal law whatever had then passed since the new government was established, and a sentence to the galleys was unknown in our jurisprudence, the "*existing laws*" here mentioned must have meant the Spanish laws—and, of course, the Spanish penal laws.

Another act provides (*d*), that no suit, either civil or *criminal*, shall be prosecuted against any commandant for any act done subsequent to the 30th September (*e*) of that year, by virtue of a previous appointment; with proviso,

(*a*) Act further providing for the government of the territory of Orleans, 2d March 1805.

(*b*) 11th section 4th art. Constitution of Louisiana.

(*c*) Act 2d February 1805, sect. 1. 2 Martin's Dig. 226.

(*d*) Act 13th December 1804, sect. 1. 2 Martin's Dig. 106.

(*e*) The reason why the 30th September is the date referred to is, because on the day after, the law organizing the territorial government went into operation; and it was doubted whether the acts done after that time by officers previously appointed, were valid.

that it shall not protect him from prosecution for *fraud or crime* under colour of office. But, at that time, there were no other than the *Spanish laws* for punishing *fraud or crime*; therefore, here again the existence of those laws is acknowledged.

Again, on the 1th May 1805, an act was passed for the punishment of crimes and misdemeanors, which, after specifying a number of offences, directs by the thirty-third section, that all the offences therein named shall be construed and tried according to the common law of England: and by a subsequent statute, passed in the same year, two or three other crimes are added to the list; and it is further enacted, "that all *other crimes, offences and misdemeanors*, committed by free persons, and not provided for by this act or the one to which this is a supplement (act of 1th May 1804), shall be punished, and shall be prosecuted and tried according to the common law of England." There were, then, "*other crimes, offences and misdemeanors*," which were not enumerated in the only two statutes that had then been passed. Against what law were they offences? Clearly against the pre-existent Spanish law. This section was repealed the next year. The repeal left things in the unsettled state they were in before the section passed, as to the mode of procedure; but it did not change the expression of legislative opinion as to the existence of the ancient laws.

But this is not all. The acts I have quoted were passed under the first grade of government, when the legislative council was appointed by the president. Under the second the elective franchise was extended to the people; and one of the first acts of their representatives was not only to acknowledge the same laws, but to vest in the superior court of the territory the power of punishing crimes that were committed under the Spanish and French governments (a).

Thus, the principles of national law, the acts of con-

(a) Laws 1st territorial legislature, 3d June 1806.

gress, the laws of territorial legislatures established by them, and the constitution of the state, all concur in proving that the ancient civil and penal laws of the province continued in force, except in those particulars in which they were modified by our institutions, or repealed by our laws. It becomes, then, highly important to determine what parts of those ancient laws are thus modified ; which of them have been repealed ; and what are the provisions of those which still exist unaltered. If all those laws have been abrogated, there was no foundation for the apprehensions expressed by your predecessors on that subject. If the abolition is express as to some, and presumptive only (and of course doubtful) as to others, their apprehensions were well founded, and the doubts they entertained ought to be removed ; and if any parts of that law have neither been expressly nor impliedly repealed, all such parts being still virtually in force, ought to be examined ; and if good, to be re-enacted in a language that may be understood ; or, if bad, to be repealed.

Laws may be repealed either expressly or by implication. But there is nothing that has the appearance of an express repeal in the case before us ; unless it be the clauses contained in the several recited acts which continue the existing laws, with the exception of such as are inconsistent with those acts respectively. But this, in truth, is no more than would have been effected without that clause. For a repugnancy between the old and the new law is an implied repeal of the former ; and this is the only criterion (a) by which we can judge that there is such repeal ; for it has been decided (b) in our courts, in conformity with British decisions, that affirmative statutes, not incompatible in their execution with the old law, and containing no negative or repealing words, do not abrogate the old law.

The Spanish laws, then, have not been expressly re-

(a) 1 Black. Com. 89.

(b) 1 Martin's Rep. (new series) p. 74.

pealed. Have they been so by implication? Certainly they have not been so altogether, for there is not the least repugnancy between many of them and our constitution or laws. What classes, then, of them have been repealed?

First, it would seem clear that all those are abrogated by the mere change of government (*en*) which relate to the prerogative of the crown, and to the mode of making the appointment of officers. As to the duties of such officers, in the administration of justice and preservation of peace, they must be performed by those appointed by the new power, having corresponding functions, whether under the old name or with a new designation. Thus, soon after possession was taken by the French in 1803, Mr. Laussat, the French prefect, appointed a municipality to exercise the powers of the Spanish *cabildo* within the city, which, on the transfer to the United States, was continued with the same attributes until the town was incorporated by the legislative council. Thus, too, the governor, immediately after the transfer, appointed an *alguazil mayor* and commandants, who were to exercise, as far as was compatible with the new order of things, the same functions with the officers of that name under the Spanish government.

Secondly, all those laws are abrogated which would interfere with any right secured by the constitution or laws of the United States or of the state; such as the liberty of the press, the right to bear arms, the right of having counsel, of trial by jury, and others of that description.

Thirdly, I am inclined to concede that all those laws are virtually repealed which bear upon the same offences that are prohibited by laws passed since the cession, although there may be nothing absolutely repugnant between the two penalties; there being, in my opinion, a difference between acts passed by the same government on the same subject (all of which are considered as one

act), and the acts of a new power legislating upon an offence which had been defined by the jurisprudence of a former power; in which latter case I am inclined to think, that the new legislation ought to be considered as expressing its whole will, unless there is an express or implied reference to the old law. And finally, the law of evidence, the mode of trial, the rules of procedure, and definition of each of the offences enumerated in the act of 4th May 1805, are changed, *so far as relates to the offences so enumerated*, because there is a clear repugnancy between the old law and that statute in relation to those particular offences.

The most liberal rules of constructive repeal can go no further; yet, discarding all that comes within these rules and all that is expressly repealed, when we look into the former law, enough of it will remain to make us reverence the wisdom which directed that all doubts, as to its existence, should be removed. It would be difficult perhaps impossible, to give an accurate list of the penal laws of Spain which remain unrepealed, or to furnish a complete analysis of their provisions. But this very uncertainty is alone a sufficient motive to justify legislative interference. Some cases, however, may be ascertained; let us examine them. The investigation is both curious and instructive, and it will produce more serious results than at first sight might be supposed.

The laws designating offences against sovereignty and the public peace have been generally provided for by our statutes, or by the constitution. They, therefore, come within the rules I have laid down, and may be considered as repealed.

But before we enter further into the very cursory examination which it is proposed to make of such offences, affecting reputation, person, property or religion, as by the rules laid down may be supposed yet to be in force, an important title presents itself, which has no corresponding division in our statute law, or that system to which it refers. It operates on the condition or standing in society of those who come within its

purview. It is called in the Spanish law, "Enfameamiento;" and, from its definition, is a species of dishonour attached to persons, as well from their birth or course of life, as from having incurred the animadversion of the magistrates, without being convicted or even accused of any offence; as from the condemnation for an infamous crime. Political disabilities attended the same which our institutions have, in some instances, virtually repealed, but the note of ill fame may still remain, and greatly influence the comfort and respectability of those to whom it is thus attached by law, if those laws are still in force. The subject forms the sixth title of the seventh book of the Partidas. By the second law of this title, the innocent fruit of an illegal marriage, the son whom a father may justly or unjustly have accused in his testament, the suitor to whom the judge may, in court, have addressed an admonition to amend his life, the advocate who may have been warned not to bring a false accusation, the man of good credit who availed himself of his character to ruin that of another by slanders, and the unfaithful depository, were all declared infamous. By the third law, not only the wife unfaithful to a living husband, but she who forgets a dead one in the arms of a second before her year of mourning is expired, together with her father, if he consent to the marriage, and the too impatient successor of the deceased, come within the penalties of the law. The following law confounds in the same indiscriminate class of infamy, procurers, comedians, mountebanks, usurers, recreant knights, fore-sworn promise-breakers, gamblers, and buffoons. The exclusion from office of all these ill-associated descriptions of persons is, perhaps, remedied by our constitutional laws; but their infamy creates an incapacity to testify, and this again is partially counteracted by the reference to the English rules of evidence in certain enumerated crimes. But in the offences not enumerated in the act of January 1805, beyond which, as I shall show, the reference to the English law does not extend, and in all civil cases, what is to take away the disability to testify?

Our civil code (a) renders those incapable *whom the law deems infamous*. What law? If the answer to this important question be, as I think it must be, the unrepealed law by which the land was governed; if there should be a doubt on that subject; do those who flatter you with dissertations on the perfection of your present laws, who cry out "peace, peace, when there is no peace," do these blind guides know the depth of the pit to which their counsels are directing you? Have they calculated, or can they not perceive the evils attendant on this state of things in this one particular? Let it be remembered that these disabilities attach not upon conviction only (b), but from the fact. Let us suppose, then, that a usurer should be appointed to an important office, and it becomes the interest of an individual to make this exception to his official acts, will it be satisfactorily answered by saying that the constitution sets no bounds to the appointing power? But, it may be replied, the same constitution continues all laws which were in force at the time of its adoption until they shall be repealed; but the law declaring infamous persons incapable of exercising office has never been repealed; therefore, if the pre-existing law excluded certain persons as being infamous, there is nothing in the constitution that takes away the disability. With respect to elective offices it is different; where the constitution enumerates certain qualifications, it is reasonable to suppose it expresses all that are required.

Should it be thought, however, that the Spanish law creates no disqualification to office, the more important

(a) Art. 2260. See also the act establishing the superior court, sec. 10.—"No witness, of the age of discretion, shall be disqualified from testifying on the ground of being incompetent, unless such witness be at the time of producing him, interested or infamous."

(b) This law confirms the opinion that a usurer is ipso facto infamous, without any conviction, and as the law does not distinguish whether it speaks of open or secret usury, it must be understood of all." Greg. Lopez. note on the 4th law, and he concludes, *sunt ergo in magno periculo usurarii*.

objection as applied to witness sections. In the list of exclusions, how many are enumerated when it would be in the highest degree unjust and absurd to render them competent, were it law now to be made a law subject? The accidental instance of extrajudicial oath-taking following a profession that he had been of old a Roman and Greek and Latin—or one that although requiring neither genius nor learning, he yet was—scarcely had the sanction of great names in ancient and modern times for its practice—receiving an undesired reputation from a choleric judge—solacing the grief of a widow before the time permitted by law for diving up her tears—are certainly not acts that render one unworthy of belief, not to speak of the numbers who would be excluded under the exception of gambling, or the other impurities specified in the law. Yet one of these may be the only witness to a transaction on which fortune may depend, or to exculpate from a charge which may affect reputation or life.

I have enlarged more on the consequences of removing doubts as to the existence of this law because of its general operation; for there is scarcely a litigated question in which it may not be raised, or a person accused, to whose interests it might not prove fatal. Let us now examine whether there are not penal laws, strictly so called, that may not be supposed still in force, according to the principles which have been laid down.

The seventh title of the seventh Partidas treats of the *crimen falsi* (*falsedades*), and (among many offences

(a) Cato, the censor, would, under this law, have been doubly disqualified as a witness; for, if Plutarch is to be believed, he was not only a usurer but a **** for his own slaves. "Teniendo," (in the expressive language of the Partidas' describing the offence), "sus alevas en su casa fazedolas fazer maldad de sus cuerpos por dineros!" 7 Part. tit. 6, law 4.

The list of exceptions would be greatly swelled, if the commentator's opinion is to be followed, who includes in the class of usurers not only those who, like Shylock, deserve to be "rated about their moneys and their usances"—but even dealers in exchange and bankers, whose counters, he says, "are altars raised to usury and oppression."

which might probably be brought within the purview of our statute against forgery, coining and perjury) forbids, under very heavy penalties, other acts which are not now considered to be indictable, but which may or may not be deemed offences while our laws are suffered to remain in their present uncertain state. Among these are the following: the advocate is guilty of this offence if he betrays the secrets of his client, or if he designedly cite the law falsely (*a*). The notary, or other person is guilty, if he deny the deposit of any mystic testament or other writing, if he hide or deliver it to another; or if any writing be deposited with him to be kept secret, he read or publish it (*b*). The judge, if he knowingly give a judgment contrary to law; the person who says mass without being ordained, and he who changes his name to one that is more honourable, are guilty and punishable for falsehood. The next is a falsity of rather difficult execution, and I believe not made punishable by any of our statutes. I must give it in the words of the Spanish lawgiver: "*Trabajanse (c) a las vegadas algunas mugeres que non pueden aver fijos de sus maridos, de fazer muestra que son preñadas: e quando llegan al tiempo del parto toman enganosamente fijos de otras mugeres e meten los consigo en los lechos, e dizen que nacen dellas, esto dizimos que es gran falsedad; faziendo e poniendo fijo ageno por heredero en los bienes de su marido bien assi como si fuesse fijo delo.*"

There are other offences in this class which I do not enumerate, because it may be doubtful whether they do not come within some of our statutes. The punishment is banishment, and confiscation of all the property of the offender to his nearest ascendent or descendant; if he have no such relation, then to the treasury. A milder punishment is inflicted on the person who (*d*), being appointed to divide lands or apportion other property in dispute, shall make a partial division; and also on the

(*a*) 7 Part. tit. 7, l. 1. (*b*) 7 Part. tit. 7, l. 1.

(*c*) 1b. tit. 7, l. 3. (*d*) 1b. tit. 7, l. 8.

arbitrator who shall designedly make a false statement of the accounts he is appointed to settle.

Under the next head, of Homicide, &c., I find the following acts made punishable, which are not so by our statutes.

The first must be a startling one to the faculty of medicine, as one of those I have cited must be to the gentlemen of the bar (*b*). It recites, *ut*, the *doctores* give themselves out to be more skilful in physic and surgery than they really are (*d*); and that by reason of their being less skilful than they pretend, some of their patients die by their fault. It, therefore, enacts, that if any physician shall give an improper medicine, or too much of a good one, or any surgeon, in dressing a wound, shall break a bone, or divide an artery, and the patient in one or the other case shall die, the offender shall be banished for five years and forbidden to practise. In due order comes the apothecary, after the physician; without whose orders, if he gives a dose to a person who dies in consequence of having taken it, the pharmacopœlist is guilty of homicide.

The destruction of our species in the inchoate state of existence is not punishable by any of our statutes. It is so by those of Spain, but they contain a provision which I have not seen in any other code that if death is caused by any medicines or herbs, given for the laudable purpose of procuring an heir to the childless, it is a punishable offence.

(a) *Ib.* tit. 8, De los Omezillos.

(b) As the presumption is that every man admitted to the bar knows the nature of the law he quotes, it might, perhaps, be argued, that whenever he cited for law that which was not law, he did it designedly, and of course made himself liable to the penalties of the law, "*de las falsedades*," which I have quoted. A law full of peril for the profession.

(c) 8 Part. tit. 7, l. 6.

(d) This part of the recital would apply to more professions than one. As the law is limited, however, it behoves the advertising part of the ~~recital~~ particularly to discover whether it be in force.

The title of Defamation (Deshonras)(a) contains some things well worthy of attention in the disquisition we are now making. It divides defamation into two kinds, by word or by deed. Both are made punishable ; and the definition includes everything that is falsely said or done to dishonour another. Defamation by deed includes writing, printing, gestures, and all other acts done with the same intent, including such as would come within the English definition of assault and battery. One of these laws, although perhaps somewhat too strict for the freedom of modern manners, might, in our days, find some careful guardian, jealous husband, or prudent father to put it in force, if it should be deemed one of those that have lost its use, not its authority ; and I transcribe it that the gay gallants who are subject to its penalties, may know the peril of their ways.

“ Women,” says the preamble, “ whether widows, wives or maids, who live virtuously in their houses with an honest fame, are frequently injured, grieved and dishonoured by men who take divers means of doing so. Some there are who are continually whispering to them, visiting frequently at their houses, and following them in the streets to the church or other places to which they go ; others who dare not pay those public attentions, secretly send jewels to them and to the persons with whom they live, for the purposes of seduction ; and others again, strive to corrupt them by the instrumentality of infamous agents, or by other unlawful arts. By these means the weak are led astray, and the virtuous are suspected of evil communication with those who pay them such attentions. Wherefore, we hold that those who conduct themselves in this manner do great wrong and dishonour, not only to the women, but to their parents, their husbands and other relations ; and we command that whoever in any such manner offend, shall be fined for the benefit of the woman who is dishonoured ; and moreover, the judge shall admonish him

who thus follows and dishonour a woman, that he do so no more, and that he desert from such folly, under the penalty of more serious penalty if he do not do so.¹

Among the other evil which are considered as reflecting dishonour on whom they were perpetrated, are the schoolboy tricks of shutting another out of his chamber and sealing the door, smothering out the neighbour in the story above you, or throwing water on him who is below. Contemptuously throwing down a book in the presence of the author, is a dishonour under the law, as well as accusing one of theft; but from this last the astrologer, who is consulted to find out stolen goods, is exempted, if he be a true astrologer, but not if he is a pretender to that noble art.

It is difficult, in reviewing some of these laws, to preserve the gravity required by the general subject; but it was deemed necessary to show in what manner trivial as well as more serious acts were confounded in the laws, to which we may, by no forced construction, be still liable. Some of those which remain are of a graver nature.

Injuries against the peace are provided for in a separate title (*de las Fuerças*) (a). Most of them are embraced by our statutes. Some, however, are not; and of these last only it is necessary to speak. One of these is the forcible entry into the possession of real or personal property; for which the penalty is the loss of the property, if the party had any in the thing or land forcibly taken, and its value, if he had none. The same law applies to the tenant who holds over by force; and the borrower who, without paying the debt, shall forcibly resume his pledge.

In the title of Theft there is one remarkable provision by which common gamblers are exempted (b) from punishment for theft, or any other crime, except murder, which they may commit in a house, the master of which receives them, knowing their character. Another makes it a punishable offence to remove a land-mark.

(a) 7 Part. tit. 12.

(b) Tit. tit. 14. tit. 2.

The sixteenth title, of Fraud, specifies a number of acts of this nature, all of which are punishable by our statute; and require no other remark, than that our modern professors cannot claim the merit of originality, several of their most approved stratagems appearing by these laws to have been practised as early at least as the thirteenth century.

Offences against morals have not attracted the attention of our legislature. We have but one statute on the subject. In the Spanish law there are many. Adultery is made a crime. The faithless wife is punished with stripes and confinement^(a) for life in a convent. Her seducer with death. The husband may forbid the person he suspects of a design on his domestic peace, to visit or speak to his wife; and any interview after this admonition, is conclusive proof of guilt^(b). The guardian of a female orphan who marries his ward, or gives her to his son, is guilty of this offence^(c).

One of our statutes makes incest a crime, punishable by imprisonment for life; but as it gives no definition of the offence, a reference to the Spanish law may be found necessary. This defines the crime to be an illicit connexion between relatives unto the fourth degree of the canonical law, by consanguinity or affinity, expressly including the sisters-in-law and brothers-in-law; and, by a subsequent disposition^(d) a connexion between persons who were sponsors for the same child (*compadres y comadres*) incurred the same penalty. The punishment was the same as that of adultery, if the offence were committed without marriage; but, if after marriage, banishment for a nobleman, with the addition of stripes for other offenders.

Seduction of a woman^(e) of good fame, incurs forfeiture of property and stripes. The husband who sells his own honour and the virtue of his wife, the agent^(f) in the

(a) *Ib.* tit. 17, l. 13.

(b) *Ib.* l. 12.

(c) *Ib.* l. 6.

(d) *Nueva Recopilacion*, lib. 8, tit. 20, l. 7.

(e) 7 *Part.*, tit. 19.

(f) *Ib.* tit. 22.

seduction of a woman of virtue, and those who educate children for the purpose of public prostitution, are punishable with death.

As the legislation of which I am giving a partial review was made in the thirteenth century, it is not surprising to find that astrology, witchcraft, and incantations, love powders and wax images make a figure in it. Divination is a capital offence, except by astronomy, which is not only permitted, but praised as one of the seven liberal arts, "because the computations and presages that are made by this art are drawn from the natural course of the planets and stars, and not taken from the books of Ptolemy and other sages who treat of this science." Now, however, but adepts are to meddle with this; all false pretenders to it, witches, sorcerers, fortune-tellers of every description, enchanters who raise the spirits of the dead, were capitally punished, but with the proviso, that if the object of the exorcism or of the black art be to cast out a devil, to preserve the crop from hail, or from lightning, or from insects, or for any other good object, the case is altered, and instead of punishment the operator is entitled to reward.

The subject of the few other laws of which I shall speak which were in force here on the change of government, is Religion. There is a general impression, so firmly established as almost to amount to conviction, not only that all former laws on this subject are repealed, but that no law can constitutionally be passed subjecting any one to penalties for his religious belief, or giving any preference to one religion over another. It is to be lamented that this persuasion is unfounded. For however we might rely on the enlightened spirit of the age to prevent the passage of such laws, yet the interest in question is one so essential to the happiness and peace of the people, that it is not only unfortunate but extraordinary, that the liberty of conscience should have been overlooked when the other great interests were secured by the constitutional compact.

This omission is the more surprising, because all the

several laws and compacts regulating our political state, prior to our constitution, have contained stipulations on this head. The treaty of Paris declares, that until the inhabitants of the ceded territory shall be admitted into the union, they shall be maintained in the free enjoyment of the religion they profess. The law establishing the first grade of government, and the ordinance which gave the second, both contain restrictions on the legislative power intended to secure religious liberty. But our constitution, careful of every other right, descending to minutiae which would seem to trench on ordinary legislative power in other cases, is silent in this. That of the United States does not supply the deficit, it only limits the powers of congress on that subject, but imposes no restraint on those of the states.

In the examination of this subject, which I have made with solicitude, there are two arguments. one that might be used to show that the old laws were repealed; the other that there exists a restriction on the powers of the legislature. I state them with pleasure, and hope most sincerely that they may always be deemed conclusive with others, although I regret to say they are not so with me.

First, as to the repeal. The act of 1804, giving us the first grade of government, contains the following provision: "The governor and council shall have power to alter, modify or repeal the laws which may be in force at the commencement of this act. Their legislative powers shall also extend to all the rightful subjects of legislation, but *no law shall be valid* which is inconsistent with the constitution or laws of the United States, or which shall lay any person under restraint, burthen, or disability on account of his religious opinions, professions or worship; in all of which he shall be free to maintain his own, and not be burthened for those of another."

I fear that the restriction against laws upon the subject of religion, by the true construction of this clause, operates prospectively only on the laws that might thereafter be passed by the legislative council; if so, it causes

no repeal; for the eleventh section provides for the continuance of the laws in force in the territory, except those that are inconsistent with it. Now if the restriction is prospective only, the former laws are not inconsistent with it. Should this, however, be a repeal, it is an implied one, and nothing of such importance ought to be left to implication.

The restriction on the powers of the legislature to pass such laws stands on very debateable ground. It is not contained in the constitution. But in the ordinance giving us the second grade of government, there are certain articles which are declared to be a compact between the original states and the people and states in the said territory, and which are for ever to remain unalterable, unless by common consent. The first of those provides, that no person, demeaning himself in a peaceable and orderly manner (a), shall be molested on account of his mode of worship or religious sentiments, in the said territory.

By the act authorizing the inhabitants to form a state government, it is provided, among other things, that the constitution to be formed shall contain the fundamental principles of civil and *religious liberty*; and the law admitting the state into the union, contains the proviso, that all the conditions contained in the third section of the last recited act, shall be considered as fundamental conditions and terms, on which the state is admitted into the union. Whether a law passed in contravention of the article of the ordinance or of the proviso in the two laws regulating our admission into the union, would on that account be declared void, when the constitution contains no restriction of power on this subject, is a question requiring an argument that does not come within the scope, and could not be brought within the

(a) In bad times this phraseology might give rise to oppression: "he is not to be molested in his religion, if he behave in an orderly manner." Do not his religious rights then depend on the order of his behaviour? What would an inquisition or an inquisitorial judge call orderly?

. It is stated to show, that even the laws respecting religion, there doubts expressed, as one of the the work which I have now the

ject are extremely oppressive and, Judaism, and blasphemy, were

Jews was tolerated; but an attempt
ving their houses on holy Friday,
re, and being guilty of the absurd
young children" at their festivals,
leath; as was the connexion of a
woman; for, says the lawgiver (a),
death who commit adultery with
more do Jews deserve that punish-
hemselves with Christian women,
he wives of our Lord Jesus Christ,
ptism they have received in his
ance the Jews had a protection
e English laws do not give: they
n the day of their Sabbath.

be a departure from the Catholic
the Church of Rome, or disbelief
The punishment is death at the

ng that is said or done in contempt
ry, or the saints. The punishment
is forfeiture, according to the rank
e repetition of the offence; if by
he hands.

may have been repealed by later
doubtless, were added prior to the
was ceded, which have not been
ach. Therefore, the enumeration
correct. This will be of less im-

9. Recop. de Cast. § 2, 3 and 4.
and 2. Rec. 3, 1.

portance if the object of the detail is kept in view. This was to give a general view of such penal laws only as might not be supposed to be repealed by our constitution or laws, and it must do be remembered that the provisions, exceptions and other detail contained in these laws, which would have been indispensable if they had been quoted as rules of action were not then brought within their existence and general operation only as the subject of inquiry, yet I have been guilty of no voluntary omission, and have followed the text always in preference to the commentary of the law.

Most willingly would I here close this catalogue, but the present state of our jurisprudence renders it a duty with which I reluctantly comply, to add to the list a word at which humanity shudders, and to ask, whether we are as sure as we ought to be that *l'eternité* forms no part of our criminal law? It found, with all its horrors, a prominent place among the laws of Spain, and to determine in what degree they are modified or repealed, the hateful task must be performed of adverting to their provisions.

This diabolical power was vested in the judge, with no other limitation as to the degree in which it was to be inflicted, than that it should not extend to loss of life and limb. Within these limits he was not only empowered but instructed so to direct the operation as to create the most excruciating physical and moral anguish. These monsters studied the human frame, to discover in what part it would feel the acutest pain; they marked the working of the mind, to know where the deepest wounds of the spirit could be inflicted; and they insert the result of their cold-blooded calculation in their laws with minutiae that sicken the heart. Among several delinquents, the judge is directed to select for this operation of cruelty and horror, the youngest, the most delicately framed (a), the most tenderly educated, and—is this an earthly or a hellish code that I am reviewing?—when

(a) *Ib.* tit. 30, l. 6, *Com. Var. Rec.* c. 13.

there is a father and a son, to rack the limbs of the child in the presence of the parent—"because," says the worthy commentator on this text, "a father (a) can better bear his own torments than those of his child;" and in the same spirit, women were made the first victims, until some of these fiends discovered that they bore pain with more fortitude than men. The objects upon whom the application of this engine for beating out the truth, as it is called in their laws (*escodrinar la verdad*), was authorized, were, first, the accused (b), who was vehemently suspected, or against whom there were no certain proofs, for the purpose of forcing a confession; secondly, a convict, to make him discover his accomplice; thirdly, a witness who prevaricates. It would not have been necessary to enter into the details of these laws, if their provisions had been known or attended to by those who framed our constitution. They seem to have entertained the common error that torture was only authorized in order to force a confession from the accused; and they, therefore, thought it would be completely abrogated by the clause which provides, "that the accused shall not be obliged to give evidence against himself,"—leaving its application to force testimony against others entirely unaffected by the provision, at least so far as relates to the offences not enumerated in the act of 4th May, 1805. I would not be understood as expressing a belief that this mode of obtaining testimony will ever be resorted to. It is too repugnant to our feelings—too inconsistent with our morals and earliest impressions. *Non nostri generis nec sanguinis est*. It is not of our country, and belongs not to our generation or race. It is of foreign growth, and cannot be engrafted on our jurisprudence. Yet the word must not stain its pages. It is yours to purge them of this disgrace; to take away not only the possibility of its being inflicted, but prevent its very sound from offending the ears, or its idea polluting the minds of free

(a) Greg. Lop. note on l. 5. 7 Part. tit. 30.

(b) 7 Part. tit. 30, l. 8. Ant. Gom. ubi supra.

men: or, if it must be remembered, let it be only as one in the list of evils from which our countrymen with a confederacy of free states has relieved us. Yet, this task must be performed notwithstanding the confidence we all feel that the intelligence and humanity of our fellow citizens would reject the suggestion, yet we must not tempt folly or wickedness by placing such weapons within its reach. All the inhuman and ill-considered and unknown laws must be positively, unequivocally, publicly abrogated. Reason requires it; prudence points out the danger of delay; and experience has added her warning and convincing voice to teach us how little reliance we can place on our fancied security (a). For, touching this subject, let me answer those who still tell you there is no danger; who can see no mischief until it is felt; who deride us visionaries and false prophets of evil, all those who by a prudent foresight strive to avert them. Let me tell those incredulous apostles, who will not believe

(a) I should have thought the danger almost imaginary on this point if I had not found the philosopher Voltaire, his disciple Diderot, and M. Hautefort, all three commentators on Beccaria, enthusiastic admirers of his humane doctrines, and particularly of his arguments for the abolition of torture against the accused. If I had not found them more or less expressly agreeing, that it ought to be retained as the means of procuring from a convict the disclosure of his accomplices.

"Reserve (says Voltaire) at least this cruelty for acknowledged villains, who have assassinated the head of a family, or the father of his country, to find out their accomplices," &c.—*Comm. Beccaria*, c. 13.

Hautefort says, "It (the torture) can only be employed against a criminal convicted in the most legal manner, in order to discover his accomplices." But he adds, "would it not be essential to examine whether the search after accomplices is not too rigorous."—*Observations sur le Livre des Delits et des Peines*.

Diderot is explicit. He says, "this additional torment is necessary to draw from him (the convict) not only the discovery of his accomplices and the means of arresting them, but an indication of the proofs necessary for their conviction."—*Notes on Beccaria*, c. 12.

When the apostles of reform and preservers of humanity use such language as this in favour of the application of the torture in one of the cases in which, if my argument be correct, it still may be considered as part of our law, is it a very absurd fear which urges its positive abolition?

that a stroke has been inflicted until they can lay a finger on the wound, or that what has been dead may be revived, until with their eyes they behold the resurrection—let me tell them, that such revival of dead and obsolete laws requires no miraculous power to effect; that a weak, an ignorant, or a conceited magistrate is sufficient for the operation; that it has actually happened, and that by such agency one of the worst, the most inhuman and arbitrary of all those ancient laws has been executed under our free and enlightened government. In a remote parish of the then territory, a human being was, for I know not what crime, by the sentence of a magistrate, condemned to be *burned alive*; that the sentence was executed in his presence; and that there was no law passed by the government of the territory authorizing such punishment. It is true, the victim was a slave. It is true, that a law of Spain directs that the slave shall be punished with more cruelty (*a*) than the freeman, and the commoner than the nobleman. But the only law (*b*) I have been able to discover for using this inhuman punishment makes no distinction. It permits the judge in every capital case to designate the punishment. It may, at his discretion, be either “decapitation with the sword (for the statute with great humanity forbids the saw or the reaping-hook), or it may be by burning, or hanging, or casting to be devoured by wild beasts.” Our judge, in the exercise of the discretion thus humanely given to him, chose the fire and the faggot, and afterwards showed where the writhings of agony had forced the chain of his victim into the bark of the tree that served for a stake. No name is mentioned, for death has removed the magistrate from the reach of

(*a*) 7 Part. tit. 31, l. 8. “Ca mas crumiente deven escarmentar al siervo que al libre y al ome vil que al fidalgo”

(*b*) 7 Part. tit. 31, l. 6. I must in candour state that I am ignorant under pretext of what particular law this execution took place; but as the one I have cited does authorize it, and there was no territorial statute that could justify it, I thought it fairer to suppose that he acted with than without authority.

justification or censure; but bearing upon the evidence of the fact, and its bearing being so mixed up with the subject of the report, I should have been culpable in suppressing, however reluctant I am not to mention it.

Let me now ask those who have followed me through this rapid detail, whether wisdom, prudence, and even necessity, did not dictate to the Legislature the duty of "removing doubts relative to the authority of any parts of the penal law of the different nation by which this state, before its independence, was governed," and of selecting out of them "such statutes as were proper to be retained in the penal code?" In the manner to which I have referred, there are some provisions that we should find an advantage in retaining; but much inconsistent with our ideas of justice, so well calculated to become the instruments of oppression, that all doubts of their existence as a part of our law, ought to be put aside. Where there is doubt, there is danger; and my object in urging that none of the received rules of repeal apply to these laws, has been only to show that doubts may be raised, that in the hands of a more able arguer those doubts may be converted into conviction of their existence, and to the enforcement of such as might suit the party-feeling or other bad passions of the moment. Can the confusion of such a decision be well imagined? We are now blessed with peace, with exemption from any other party feeling than those necessary for a due vigilance over our servants. We have magistrates incapable of wresting the law to the purposes of interest, ambition, or vengeance. Now is the time to act. If those laws are in force, let them be repealed; if they are not, dissipate all doubts. Do not suffer them, in either case, to remain a snare to the unwary, and instruments in the hands of a corrupt or ignorant judge; for no oppression is so detestable as that which is exercised under the guise of justice; it is the only tyranny which can be feared under our government. The spirit of the people would soon rise against any open breach of their rights. But their respect for the laws, their reverence

for those who administer them, make them slow to perceive the oppression that is clothed in the forms of law ; and when it is discovered, it must remain unpunished ; for the excuse of error in opinion is always ready to cover every fault in this branch of our government. Place beyond its reach, therefore, all those instruments which would be equally injurious, whether brandished by folly, or directed by malignant design ; leave no doubt as to the existence of those laws which you desire to have enforced ; repeal all those which it is inexpedient, unjust, or impossible to execute. Be assured, legislators, of this truth, that there can be no law of which the existence is a matter of indifference. It must remain in your code for good or for evil : for good, if it be a wise law and carried into effect ; for evil, whether it be good or bad, if it remain unexecuted. In the one case the people are taught the dangerous lesson that the best precepts may be disregarded with impunity ; in the other they are subjected, when the danger is least apprehended, to the unjust operation of a forgotten law.

Indeed, there is scarcely a greater reproach to the jurisprudence of a nation than the existence of obsolete laws (*a*) ; that is to say, laws that are none—laws that are no rule to guide our actions, because they are unknown to, or forgotten by those upon whom they are to operate ; but which yet may be used to punish them for their contravention, because they are known and remembered by those who are empowered to enforce them, whenever the malice of a prosecutor, or the ignorance, corruption, or party-feeling of a judge may induce

(*a*) Hear what the wise Bacon says on this subject : “*Dicit propheta plus super eos laqueos ; non sunt autem peiores laquei quam laquei legum, præsertim pœnalia ; si numero immensæ et temporis decursu inutiles non lucernam pedibus præbeant, sed retia potius objiciant.*” *Aphorismus* 53.—The prophet saith, *it shall rain snares upon them* ; but of all snares, the snares of the law are the worst, especially of the penal law ; when they have become useless, either by the accumulation of their number or by the lapse of time, they are not a light to guide our steps, but a net to entangle them.

him to draw the rusty word from its obscurity to apply this to our case, as has been seen.

"We have but time and men to spare
Which for the cure of many evils serve."

statutes of such number and variety that there is not a state or condition in life that cannot be covered by them; not a man in the community that does not make himself obnoxious to the penalties of some of them. Let the long but imperfect list I have given be perused, and where is he who can say that one of these persons may not be brought within the purview of one or more of the loose and entangling definitions contained in those laws? But even if they should never be made the instruments of oppression, if they should remain wholly unscoured, the effect is scarcely less to be deprecated, and is thus well expressed by the high authority whose aphorism I have just referred to in a note:—"Here is a further inconvenience of obsolete penal laws; for this brings on negligence, neglect and habit of disobedience upon other wholesome laws, that are fit to be continued in practice and execution, so that our laws endure the torment of *Mozentius*, the living die in the arms of the dead!"

It is your province, by correcting the evil, to complete what your predecessors began. This might be effected by a general repeal; but that would be a small part of the duty which your constituents--which the world requires at your hands. *Graviora manent.*

(a) The slumber in which our Spanish statutes has been plunged, is somewhat longer than Shakspere has feigned those of *Vinna* to have been, yet it may happen, that some "precise lord Angelo" may be found,

"To awaken all the enrolled penalties
Which have like unscoured armour hung to the wall,
And none of them been worn; and for a name
May put the drowsy and neglected act
Freshly in execution."

Let our modern Claudios beware, for among the rusty Spanish statutes is one imposing the penalty of death for the very offence which put the gay deceiver of the play in peril of his head.

The list of defects in our present system is but begun. They must be faithfully exhibited to your view. The allegation so frequently repeated, that we want no reform, has, it cannot be concealed, had its effect on the community, on its representatives. It shall be completely refuted. I speak with confidence because I know my ground. The task is not a pleasant one, but it must be performed. Let us proceed with the detail.

The common law, to which we are referred for definition, procedure, and evidence, has, I may believe, been demonstrated to be rather, to say the least of it, an uncertain guide. But what shall be said of the legislation that in many cases gives us none (*a*)? Yet such is ours. This point deserves to be the more seriously considered, because I believe it has not hitherto attracted attention.

By the 33rd section of the act so frequently referred to (4th May (*b*) 1805) it is enacted, "that all the *crimes, offences and misdemeanors herein before named*, shall be taken, intended and construed according to, and in conformity with, the common law of England; and that the forms of indictment (divested, however, of unnecessary prolixity), the method of trial, the rules of evidence, and all other proceedings whatever in the prosecution of the said crimes, offences and misdemeanors, changing what ought to be changed, shall be (except as by this act is otherwise provided for) according to the said common law."

Now although it seems sufficiently plain that the common law is referred to only as relates to the crimes and offences enumerated in that act, the argument is made stronger by the third section of the act of 3rd July 1805, being the second law on the subject of offences

(*a*) Bacon, a name which I love to quote, in inquiring into the causes of the law's uncertainty, places this first on the list—"duplex legum incertitudo; altera ubi lex nulla præscribitur, altera ubi ambigua et obscura." Unfortunately we have both.

(*b*) This act is quoted in Martin's Digest, sometimes under the date of 24th January 1805, sometimes the 4th May 1805. I believe the latter is the true date, but have no means here of ascertaining it correctly.

that was passed by the Cortes of 1805. It declares "that all *other* crimes, offences, and misdemeanors not provided for by that or the former act, should be punished, prosecuted and tried according to the common law of England." This cannot be taken to mean that the *original* act gave the *legislature* power to do so, but only that an express to the former implied delegation of power will, that the common law of England should be applied to those offences only that were enumerated in the act of 1805. Yet that act enumerates only certain offences, and very many more have been created by subsequent statutes, as may be seen by a reference to the schedule annexed to this report. But in no one of these acts is there any reference to the common or any other law, for the definition of the crime, the mode of proceeding, or the rules of evidence. What then did the legislature intend should be the rule to govern the courts? Did they intend the common law? Certainly, as it is a *foreign* code, they shall not be presumed to have introduced it without some indication of that intent. The legal conclusion is, that the existing laws were intended to govern in all cases where they are not abrogated or altered. In that case we should have to consult Spanish authorities for the definition of offences and the rules of evidence, and for the mode of proceeding, so far as was compatible with the other provisions of the constitution and statutes of the state. Yet this has great, perhaps insurmountable difficulties. To avoid these difficulties recourse has been had, under the plea of necessity, to the assumption of legislative power by the courts. They have, without scruple and without being questioned, applied the 33rd section of the act of 1805 to all the subsequent penal laws; they have restored the third section of this second act which the legislature repealed, and have defined and tried all offences indiscriminately according to the common law. It will not, it is presumed, be denied, that the introduction of this section into the act was the exercise of a legislative power, necessary in order to the application of the common law to the offences enumerated in

that statute. If so, it follows that nothing but the exercise of a similar power could legally apply it to offences not enumerated in that act. But it has been so applied to the other offences by the judiciary; therefore, the judiciary have exercised a legislative power. But the constitution has expressly forbidden, both by affirmative precept and positive prohibition, in the most precise terms that the language could afford, any such exercise of power.

"The powers of the government of the state of Louisiana shall be divided into three distinct departments, and each of them shall be confided to a separate body of magistracy, viz, those which are legislative to one, those which are executive to another, and those which are judiciary to another. No person being one of these departments shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

I do not ascribe this exercise of powers to any improper motive. It may, without any such imputation, be accounted for by the confused state of our criminal laws, which forced the courts either to suffer crimes to go unpunished, or to assume powers not properly belonging to them, but which the proper department would not exercise itself, and took no pains to prevent the exercise by another.

It is thus that the assumption of unconstitutional powers is first exercised, then excused, and in the end insisted on as a right; and it is as essential to good government that each department should exercise its proper functions as that it should avoid assuming those of another; for power is too precious to be lost. Whatever is abandoned by one is eagerly seized by the other; and careless legislation will inevitably produce executive and judicial encroachment.

In the case under discussion there is less cause to inculcate the courts of law, because the question has not, it is believed, been hitherto raised for decision; but whenever it shall be, its importance will be discovered, and

the inevitable result be a confession of the decision, which cannot be supposed, that the judges had legal powers, or a confession of that which they are now endeavouring to establish that events no longer occur, and the execution of the penal law. In point of law, however, that on the trial of a capital offence, a person is required since the year 1805 to witness a public confession who is competent according to the common law of England but inadmissible under the laws which I have equally reviewed, either as a usurer, a concubine, a person of illegitimate birth, or as enemy of the abused sex, or a priest (*b*), a minor (*c*) under sixteen years of age, a relation in the ascending (*d*) or descending line, or a collateral within the fourth degree, or to any of the numerous other exceptions that exclude witnesses according to the Spanish law, by what process of reasoning will any court come to the conclusion that they have the right to adopt the common law as then guided in the question? What species of testimony is to be admitted? What makes a competent witness? are questions which the laws of the country must decide by general rules. Whether any particular testimony offered any individual witness produced, comes within these rules, are questions for the judge to decide.

On the change of government there were laws which governed the admission of witnesses. The new government changed these laws, as related to certain enumerated crimes. It was silent as to the others. What was the consequence as to those others? Either, as I believe, that the old law remained in force; or, if that should not be the case, that they remained without any law to govern them. But in either case the common law of England would not be applied to them without a legislative act. The selection of that law for the offences enumerated in the act of 1805 was a legislative act. The application of it to others must be

(a) Ant. Gom. Var. Reg. 3d vol. c. 12, No. 15.

(b) Ib. No. 20.

(c) Ib. No. 14.

(d) Ib. No. 16.

one of the same character ; for, as we have seen, it is strictly, emphatically confined by that law to the offences therein enumerated, and for subsequent offences the judiciary have the same right to select the laws of Hindostan, as they have to adopt those of England. But if they have not this right, if they cannot exercise it, is there a doubt that the legislature ought and must do it, because there is either no rule, or the one that exists under the laws of Spain is so monstrous, so perfectly inapplicable to our situation, that it equally calls for renovation ? But what remedy can the legislature apply ? Is it by the summary process adopted in 1805 of selecting a foreign code ? During the territorial government this could have been done ; but now the only remedy is a code that shall define the crime, direct the procedure, and give the rules of evidence. Attention is particularly necessary to this argument, because, unless the reporter errs, it is conclusive as to the necessity of the work in question.

The framers of our constitution had been witnesses to, and had participated in the anxiety and dismay that pervaded the whole community when an attempt was made, in the earliest stage of our political connexion with the United States, to take advantage of an ambiguous expression in the ordinance given for our government, in order to introduce a new system of jurisprudence (*a*), totally unknown to, and the knowledge of which was unattainable by the people of the territory. They dreaded the common law of England. They feared another attempt to introduce it. Their escape was too recent not to make them apprehend that in future times the struggle might be renewed. They wisely thought that to be free, a people must know the laws by which they were governed. They were aware of the difficulty,

(*a*) To have had a share in averting this danger gives the reporter a satisfaction that can be equalled only by his being instrumental in the establishment of a system that may promote the honour and happiness of the state that has honoured him with the preparatory duty he is now performing.

now, the utter impossibility of this knowledge being acquired when the law is any other code system, dispersed through a body of laws which are almost unknown to three-fourths of the population. They saw the danger of permitting a portion of the people to become the sole depositaries of the knowledge and the sole interpreters of the laws, and they did everything that prudent foresight could do to prevent the evils by inserting in the constitution the following clause: "The existing laws in this territory, when this constitution goes into effect, shall continue to be in force until altered or abolished by the legislature, provided, however, that the legislature shall never adopt any system or code of law by a general reference to the said system or code, but in all cases shall specify the several provisions of the laws it may enact."

By this important amendment, for which the gentleman who introduced it deserves the thanks of his country (a), and by the section which follows it requiring the judges in definitive sentences to refer to the particular law by which they were governed, an effectual bar was placed to the legislative introduction of unwritten law: and no act can now constitutionally be passed, extending the 33rd section of the act of 1805, which introduces the common law to any offences created by law since that period. If they wish to provide rules on the subjects embraced by that section they must enact them specifically, that is to say, call it by what name it may be convenient to use, they must, in effect, have a code or a law defining crimes, a code of procedure and a code of evidence. This wise provision, while it prevented a repetition of the careless legislation which introduced the common law of England without considering or even knowing its provisions, did not prevent the adoption of all those parts of it which have justly commanded the admiration of the world: but it imposed the necessity of distinguishing, of selecting, of knowing them and of

(a) Mr. Bernard Marigny is the member of the convention to whom the state is indebted for this essential service.

reducing them to writing ; so that the people might not only be governed by them, but might understand and approve them.

The position, then, with which I set out on this head is fully established : that there is no alternative but this—the legislature must make a code, or they must suffer the courts to legislate on subjects of the most importance to life, reputation, personal liberty, and civil and political rights. It will be no escape from this dilemma to say that the legislature, having defined an offence and having designated the punishment, an implied power is given to the court to do all else that is necessary. There are three answers to this argument, all of them conclusive. First, the establishment of rules of evidence is a legislative act ; it cannot, therefore, be expressly transferred, much less can it be by implication. Secondly, if a legislative power could be transferred, this power could not, because the power of the general assembly itself is restricted in this particular by the clause I have just quoted. Thirdly, if this power could be transferable from the general assembly, they could not vest it in the judiciary, nor could this latter department execute it, by reason of the express inhibition to which I have referred.

As little will it avail to say that this is not the adoption of a code or system of laws which was forbidden by the constitution, but only the adaptation of a part of such system to a particular part of our law. The evil intended to be guarded against was that of the introduction of laws by a general reference, without seeing and considering their particular import ; and most especially (I appeal to all the members of that convention) against the introduction of the common law of England, or *unwritten law*. But of what avail would this provision have been, if, by a general reference to its particular parts, the whole might have been introduced ? The argument then would be this : it is true we cannot introduce the common law by a general reference to the whole ; but by taking its parts separately we may effect the same thing, and by the same forbidden means

of a general reference to each of them. Plans without repeating or indeed knowing the details will by one act as the common law rule of evidence will be introduced, by another we will accept the laws of descent, by a third, the value of married life, and so of the rest.

Leaving the consideration of these general defects in our criminal law, we must examine its particular provisions, and here, too, we shall find a many one means to supply, so many faults to correct, and to show the necessity of a thorough reform if we wish to attain a system that will do us honour, or if we respect only to the humbler merit of avoiding the grosser faults in legislation. A very brief recurrence to our statute book will show that there is abundant reason to justify the declaration of your predecessors, that our present system "is defective in many or all of the points that are of primary importance in every well regulated state." To begin with one that must strike the most superficial observer. What else could be said of the system which provides no means for inflicting the only punishment its laws denounce against the most numerous and most injurious classes of crimes? Four-fifths of the offences enumerated in the statutes are punishable by imprisonment at hard labour; yet, for more than twenty years no means have been provided for employing those who may commit such offences. Two evils result from this neglect. The judges are forced to pronounce a sentence which they know cannot be carried into effect, and the offender suffers a punishment not denounced by law against his offence; not to speak of another consequence, which will be enlarged upon in the introductory report to the Code of Prison Discipline,—the incalculable evil of indiscriminate confinement in idleness.

What shall we say of this system? Shall we say that it is so perfect as to need no amendment—that he was rash and presumptuous who thought he could propose a better—that the legislature which authorized the experiment formed vain theories? Or, shall we deny to the

incongruous mass of written and unwritten law the very name of a system ; and say, that the humblest abilities might, without vanity, aspire to propose something that would replace it to advantage ; and that the attempt to amend it did honour to your predecessors ? These conclusions will appear the more irresistible the further we advance in the examination of our statute law.

From the year 1805 to 1819 we have fourteen statutes, providing for the punishment of more than seventy different acts, or for the same act under different modifications of circumstance and intent ; without including the prohibitions of the same act in relation to several objects specified in the statute—as, for example, the different instruments, the falsely making of which is declared forgery ; besides pecuniary and other forfeitures for infractions of particular regulations interspersed in many other statutes. This period comprises only fourteen years. Yet the want of some fixed principles of legislation, the utter disregard of system and method, and an astonishing inattention to preceding enactments, as well as to a due proportion of punishments to crimes, have led us in that short space of time into incongruities, the development of which must excite the wonder of those who have believed the repeated assertions so confidently made, that our penal laws want no amendment.

When the provisions of the projected codes are compared with the existing laws, their discrepancies will be more particularly pointed out. Here it will be sufficient, generally, to refer to a few instances of this species of legislation.

When we consider the different circumstances attached to the commission of homicide, which may characterize it as an innocent or even a meritorious act, when done in defence of ourselves or in the service of our country ; as excusable when the effect of accident ; slightly punishable when produced by passion arising from adequate cause ; or meriting the highest penalty when coming under the denomination of murder : we must see the necessity of designating with the greatest precision the

different circumstances, and the law which gave to the name of the crime a technical character, which should exclude, or at least limit, the penalty which attaches to it, would be considered as a law of equity and humanity, and would be such. So, when the law says that a person who kills another, shall be punished with death, it is not to be understood that it would be so if the accidental poisoning be contrary to the intention of the perpetrator. Let us see how far our boasted legislation complies with these requisites.

The first act (11th May, 1800) declares that if any person shall commit the crime of *crime de volée* he shall suffer death, and that if he commit manslaughter, he shall be fined, and may be imprisoned at hard labour or otherwise. The fine may be as great as five hundred dollars, and the imprisonment one year or twelve years. Here are only two kinds of homicide provided for, and, if it be true that the Spanish laws cease to operate, this law informs the citizens that every other killing may be perpetrated without incurring any penalty. It is highly important, then, to know what these terms mean. At the time this law passed, four-fifths of the population could understand no English; and a very few only of the other fifth could explain the meaning of the technical terms *murder* and *manslaughter*. The only guide, therefore, for a large majority of the people would be the French version of the law. There they find that the one is "*homicide premedité*," and the other "*homicide non premedité*," according to which the justifiable homicide of a public enemy would be punished with death, and the accidental shooting of a friend might incur imprisonment at hard labour for twelve years. Reason would revolt at this; and it would be scarcely a sufficient answer for the legislator who might have been reproached with this slovenly manner of performing his duty to say, "read on: the 38rd section of the statute takes away all cause of complaint. You are there referred to a sure guide in all your difficulties. If you wish to understand these or

any other terms in the law, you have only to consult the *common law of England*."

"But you have undertaken to give us the explanation. You have called murder *premeditated* and *manslaughter unpremeditated* homicide. Did you intend these as definitions? If you did, they lead to the absurd consequences that have been stated. If you did not, your language deceives us; you should have added the other distinctive characteristics of the several offences. In either case your legislation is miserably defective. Besides, is it not a mockery to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for the book that contained it he would smile at my ignorance, and, pointing to about five hundred volumes on his shelves, would tell me those contained a small part of it; that the rest was either unwritten or might be found in books that were in London or New York, or that it was shut up in the breasts of the judges at Westminster-hall. If I should ask him to examine his books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years could not be gratuitously imparted. Your law, therefore, I repeat, is absurd in its consequences, if taken literally, and mocks us by a reference to an inaccessible source for an explanation of its obscurities."

What could a candid man say to this reply? Every such man must acknowledge the justice of the reproach, and confess that such laws are a disgrace to the jurisprudence of his country. But this is not all. How shall we characterize the legislation that confounds, under the same denomination of crime (*a*), intentional and negligent homicide; and permits the judge to punish the same offence by the fine of a cent, or imprisonment at

(*a*) See the different divisions of manslaughter by the English law—into that by sudden provocation, *se defendendo*, and fortuitously in the performance of an unlawful act,

hard labour during a term equivalent to the usual duration of human life ; while, for premeditated homicide, under any circumstances, according to the explanation given of it to a majority of the inhabitants, the uniform punishment is death.

A few months after the passage of this law, the same legislature attempted to amend it, by enacting that "all murder by persons lying in wait, or any other kind of deliberate and premeditated killing," or which shall be committed in the perpetration of certain enumerated crimes, "shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree." Here all murder by premeditated killing forms one degree ; but premeditation is the only characteristic given by the former statute, and an essential one given by the common law, in the definition of all kinds of murder. What, therefore, is left for murder in the second degree ?

The fifth section of this act is a curious specimen of legislative indifference. It provides that a prior offender shall be punished as is directed by this act, or by the act to which it is a supplement, that is, by imprisonment or by death ; but whether the alternative is given to the choice of the culprit, to the direction of the court, or to chance, the law maintains a most dignified silence. This statute has been repealed, but it was not until the year 1818 that its absurdity forced itself upon the notice of the legislature. A similar instance may be found in a law passed the 25th March 1813, against carrying concealed weapons. By the second section of which it was enacted, that if any one should "stab or shoot, or in any way disable another by such concealed weapons, or should take the life of any person, he should suffer death, or such other punishment as in the opinion of the jury should be just." I quote the words of this statute as an instance of the style of legislation which put it in the power of the jury to select any species of punishment, from simple fine or reprimand, up to mutilation, torture and death ; and that too for giving a slight wound, or in any manner

whatever taking the life of a person, even in self defence, for there is no exception in the law. Yet this section was suffered to disgrace our penal law for five years. It was repealed in the year 1818. But the first section is still in force ; by which any one who suspects I have a knife in my pocket, may obtain a warrant to take me before a justice, who is authorized to have me searched, and should the *knife* be found, he is *obliged* to make me pay at least ten dollars to the person who gives the important information, and as much to the state ; and this sum may at his discretion be more than doubled.

The following provisions, taken without much selection, will suffice to show the want of proportion between punishments and offences that now reigns in our laws. To break the iron collar (*a*) of a slave *must* be punished by a fine of at least two hundred dollars and imprisonment for at least six months. While the court may punish him who kidnaps a free person with a fine of ten cents (*b*) ; and even for a second conviction for this odious crime there is no maximum, and the imprisonment may be only for a day.

By another statute now in force, "if a woman shall be delivered of *any* issue of her body, and shall endeavour privately, by drowning or secret burying thereof, or in any other way," "so to conceal the death thereof that it may not come to light whether it be born alive or not," she and those who aid, &c., shall be imprisoned not less than five nor more than fourteen years. This is a refinement upon the reprobated statute of James 1st, which is not more objectionable from the severity of its penalty than the want of principle which made the concealment of the birth such evidence of the murder as to throw the contrary proof on the accused. But even that statute permitted the unfortunate mother to exonerate herself by showing that the child was born dead. Ours, on the contrary, inflicts the penalty for the offence of concealment, or the private burial of a monstrous or abortive birth. That statute confines its provisions to

(a) Law 6th March 1818, section 5.

(b) Ib. section 6.

[illegible]

needle thrust into the spine is as dangerous as a sword. Yet it can scarcely be called a weapon.

Again, a thrust with the fist of an athletic man without any weapon at all may be as dangerous as any offensive weapon. This result then may follow; if in the perpetration of robbery, the offender attempt to murder a defenceless man or a child by thrusts with his fists, or to commit a rape and murder his victim by endeavouring to smother her with a blanket, although he is prevented from the accomplishment of his crime only by the rescue of the sufferer, he escapes the penalty of the law, but if in attempting the same crimes he should be attacked and make an effectual thrust with a sword in the heat of a scuffle, with intent to kill (for all killing in the perpetration of the robbery would be murder), he would suffer death, although the attempt should be abandoned as soon as it was made, or although it was only made to defend himself from arrest.

Again, there is no positive repeal of the first section of the law of the 7th June 1806. But the second section of the one we are considering provides, that to shoot, stab, or thrust with a dangerous weapon, and with intent to murder, shall in all other cases but those provided for by the first section, be punished by hard labour only. This last enactment, therefore, is not so broad as that of 1806, which does not contain the qualification of a dangerous weapon; therefore, as the law now stands, a stab with an instrument that could not come within the description of a weapon, would now, under the first act be punished with death, while the more heinous case of a stab with the same intent with a dangerous weapon, might be punished with imprisonment for one year only.

Once more let me ask respectfully whether this part of our jurisprudence does not want revision? But this is only one head; the same or greater defects may be found in all. The same enacting, explaining, implied repealing and accumulation of provisions on the same subject, until in the short period of twenty years, our legislation has become so confused that the people, and (the truth is so

evident that the law is not intended to punish the owner of the property for the loss of the property, but to punish the thief for the theft of the property.

By the act of 19th March 1819, M. is punished by imprisonment at hard labour for any term not exceeding two years, while the lesser offence, of obtaining property on false pretences, incurs the corporal punishment of whipping and imprisonment for one year (1) and by this law, such fraud is somewhat strangely declared to be an offence against the public peace.

Larceny (c) is punished by imprisonment at hard labour for any term not exceeding two years, while the lesser offence, of obtaining property on false pretences, incurs the corporal punishment of whipping and imprisonment for one year (1) and by this law, such fraud is somewhat strangely declared to be an offence against the public peace.

By the act of 6th March 1819, the aiding (g) a slave to run away is punishable by imprisonment at hard labour, not less than two or more than twenty years; while kidnapping a freeman (h) incurs only fine, not to exceed one thousand dollars, and imprisonment not to exceed fourteen years. The judge must punish the first crime at least by two years' imprisonment, but may suffer the greater offender to escape with a nominal punishment.

(a) Act 19th March 1819, section 9. (b) Ib. section 12.

(c) Act 20th March 1818, section 6.

(d) By the 5th section of the act 20th March 1818, breaking into a sugar-house at night, with intent to steal, is made burglary.

(e) Act 19th March 1818, section 1.

(f) Act 3d July 1805, section 2.

(g) Ib. section 3.

(h) Ib. section 6.

Not to burthen this report with a longer enumeration of these discrepancies, I have thrown into a tabular form an account of all the statute offences with their present and former punishments. A few other instances of incorrect legislation in our present penal law will enforce the necessity of reform. One embarrassing defect arises from the numerous dissimilar provisions in relation to the same subject in successive statutes which contain no repealing clauses, leaving it in many instances very difficult to determine whether the penalty was intended to be changed or commuted. Slave stealers, by the act of 1805, are to be publicly whipped and imprisoned at hard labour not less than seven nor more than fourteen years. By the act of 6th March 1819, they are to be imprisoned not less than two nor more than twenty years. Was the intent of the latter statute to take away the whipping, or only to extend the limits of judicial discretion as to the term of imprisonment (a)?

Nearly the same difficulty occurs as to larceny. By the first law, whipping and imprisonment in the alternative of not restoring the goods stolen, is the punishment. The subsequent act only declares that it shall be punished by imprisonment.

Stealing or robbery of bonds, bills or notes, is not larceny at common law. It is made so by statute in England; and as larceny was to be defined by the common law, not by statute, they are enumerated in the act of 1805; and it is declared that the stealing of them "shall be punished in the same manner, both as to principal and accessory, as robbery or larceny of goods and chattels. Does this relate to the punishment prescribed by that act? or is it prospective, so as to adapt itself to any other punishment that may afterwards be provided for larceny? If it is not, stealing of bonds

(a) I have an impression that the learned judge of the criminal court of New Orleans expressed a leaning towards the latter alternative. If I am not mistaken in this, the doubt is supported by very high authority.

degrees, and as the degrees are counted by the *canon law*, it would bring within the penalties of this law not only the children but the grandchildren of brothers: and even if we look to the English law of matrimony, as well as to the Spanish statute, the sister of a wife is included in the prohibition. After the death of the wife it is not uncommon for the husband to marry her sister. Suppose such a connexion to be lawfully made in New York, and the parties remove to New Orleans, where they continue to cohabit. By adopting either of these definitions this is the *abominable crime*(*a*) intended by the statute, for which both of them must be consigned to the penitentiary for life. What rule shall we resort to in order to give efficacy to this highly penal statute? The law gives no guide, and it would be monstrous to suppose the unconstitutional intent, that it should be framed or adopted by the judges

By the act of the 7th June 1806, any judge, justice of the peace, sheriff, or other civil officer, who shall be guilty of any misdemeanor in the execution of their respective offices, shall suffer fine or imprisonment, or both. Now, without repeating the argument formerly used, that the reference to the law of England does not extend to offences under this law, let us ask, What is misdemeanor? Christian, in his notes to Blackstone, says, "in the English law, misdemeanor is generally used in contradistinction to felony, and misdemeanors comprehend all indictable offences which do not amount to felony." But, by our law, there can be no indictable offence but those created by statute, but every statute that has created an offence with us has also prescribed the punishment. What, therefore, has this law to operate upon? Nothing, if it relate only to offences that were indictable before; but if it mean something else, and is intended to create a new offence, that offence ought to have been defined; or else the court have not only the judicial task of apportioning within the prescribed limits

(a) Vide 7 Part. tit 18, l. 1.

what shall be the punishment, but also the legislative duty of declaring what acts shall be misdemeanors.

Other instances of this defect might be selected, but I hasten to close the catalogue with pointing out another glaring and dangerous fault in our present laws: the almost entire abandonment to the judiciary of that part of the legislative duty, which consists in designating the punishment that shall be inflicted for each species of offence. This is a function perfectly consistent with that which, in all good jurisprudence, is committed to the judge of apportioning, within certain limits, the quantity of punishment to the individual case. A wise legislator so arranges and classifies the offences he means to punish, that, as far as may be practicable, a slight variation from the punishment assigned to the designated crime may accommodate it to the least degree of evil that can be attached to its commission; he gives this discretion in all cases in which different shades of guilt may be supposed to have attended the same act; he withholds it only in cases where the least degree of depravity deserves the full punishment that is denounced, and it is not convenient to increase the penalty against the more immoral offenders, but he throws all those shades of crime that he can foresee into as many different classes as he can conveniently arrange, and he restricts the discretion he gives to the judge within the narrowest limits in which the distribution of individual justice will permit to be exercised. The reasons for this are evident and conclusive. Every penalty for the infraction of a law ought to be certain. Where the same act may be punished by a slight or a heavy penalty, the offender will always calculate on the slightest punishment; and the infliction of the heaviest will, for the most part, be considered as an oppression. But there is a more serious objection to giving a wide extent of discretionary power to the judge. To a certain extent his decrees may be considered as having the effect of *ex post facto* law, for the punishment is not determined until the offence is committed. The prohibition of the law, indeed, existed before, but the

sanction is created afterwards. Hatred, envy, and the other malignant passions may sometimes influence the mind of the judge; avarice may corrupt it; or the more amiable motives of friendship or compassion may give it an unconscious bias in the exercise of his functions; but the legislator, who cannot know when he frames his law upon whom its penalties may fall, can neither incur nor merit these suspicions. He, therefore, ought to assign the punishment to the offence; and, in certain cases, leave to the discretion of the judge a power of modifying it to the circumstances of the offender. In pecuniary penalties, a considerable range must necessarily be given to this power; for a fine that would be ruin to one, would not be felt as a punishment by another. In a less degree this applies to simple imprisonment, and least of all to penitentiary punishment; but the difference in their nature between the two first and the last of these punishments is so great, that it very rarely, if ever, ought to be placed in the power of a judge to inflict the one or the other, at his discretion. The circumstances that would render the last proper for offences in which the first would generally be an adequate punishment, ought, if possible, to be detailed, and form a different class of crime. The inefficiency of pecuniary fines to punish the rich, without putting them so high as to ruin the poor, renders it indispensable to place the alternative between fine and simple imprisonment in the hands of the judge.

Let us now examine how far our present statutes conform to these principles.

Kidnapping a free person is a crime, which, being destructive of personal liberty, is in the highest degree injurious to society; and moreover supposes a confirmed malignity of heart, and which of all others would seem to admit of no alleviating circumstances; yet the statute permits the court to fine the offender one cent only or to extend it to one thousand dollars, and to add imprisonment at hard labour for fourteen years. Is not this completely giving to the judge the power of legislation after the fact upon an offence of the deepest dye? He

may suffer an offender to escape with an unpaid fine, or he may imprison him for a term greater than he deserves, perhaps with his chance of life. I have no quarrel, too, that this is a law for the punishment of personal freedom; and contrast it with the law that he who steals a slave, which, by a prior section of the same Act, cannot be less than two years at hard labour. But here I am, though the criminal cannot escape, and the other assistance, with impunity, his punishment may at the pleasure of the judge be increased tenfold, by a sentence to twenty years imprisonment at hard labour. And I may once more be asked, what circumstance in the crime of stealing a slave can make two years' imprisonment a sufficient punishment for one offender, while twenty is not too much for another?

I am, in this instance, imagine two answers to this question, but each of them disclose a fault in legislation equally grave, at least, with the one they might otherwise excuse. The first is that the legislature have not provided, as they might have done, for the case of a repeated offence, and that the higher grades of punishment are intended to supply this defect. But if such was the intention it ought to have been expressed; the court then would not have had the power which they now have of awarding the same punishment for a first, that was intended for a second or third offence. Secondly, it may be said that the offence described in the statute is not only stealing a slave, but aiding one to escape from his master, which are two very different offences— one deserving the highest, perhaps, and the other the lowest penalty of the law. If this be so, it enhances instead of excusing the incongruity of the act, by confounding two distinct offences in the same clause, and permitting the court to punish one offence by the penalty intended for the other.

Take another instance from the same act. To shoot, stab or thrust by lying in wait, or in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, is death, if done with intent to murder and with a dangerous

weapon; but if done with the same intent to murder but not by lying in wait, or not in the perpetration of either of the crimes above enumerated, it may be punished by simple imprisonment for one year only, or by imprisonment at hard labour for twenty-one years. According to the English definition of terms, here can be no gradation of crime. The party, if convicted, must have given the stroke not in the heat of passion only, for then it would be a different offence, but with the deliberate malicious design to murder. The design must have failed not from any change of purpose in the offender, but contrary to his will. When combined with an intent to commit certain crimes, we see that there is no discretion left to the judge: the punishment is death. Yet, when the same offence is combined with the intention to commit any other crime, perhaps not less atrocious, one year of simple imprisonment may be deemed a sufficient penalty. To exemplify the operation of this law: if, in the attempt to set fire to a building not worth five dollars(*a*), the offender, with intent to murder, should shoot at and wound the person who discovers and prevents him, there is no discretion; the punishment is death. But if he in like manner wound the person who prevents him from assassinating his father, or from poisoning a whole community, it is in the power of the court to let him escape with one year's simple imprisonment.

This example is taken, almost without selection, from a system which is considered by some as too perfect to need any amendment! We must be at a loss in this species of legislation, however, what most to admire; the severity which punishes the attempt to commit a crime with the same awful penalty that it inflicts on its consummation; the confusion of principle which thus punishes the attempt to commit the highest crime because it is made in the perpetration of an inferior offence; the

(*a*) By the act of 22d February 1817, burning any building is made arson

want of judgment and indifference with which the election of the chief officers is made, on the part of the board of discretion, or power to the judge in the one instance, and the probability of condoning a crime which it is fixed on him in the other. The table at the end of this report will give a more complete view of the defects in our system than I need not multiply elsewhere.

It might seem an invidious task to proceed and develop the evils that pervade our penal jurisprudence, from which, however, I should not shrink were it necessary. Enough has been said to show

That as respect certain crimes, the law to which we are referred for their definition, prosecution and the evidence required on their trial, is not only in itself uncertain, but is placed entirely beyond the reach of the people.

That even that rule, uncertain and difficult of access as it is, has not been provided for offences against any of the statutes passed since that of May 1805.

That if a long list of oppressive and absurd penal laws, forming a part of those by which the country was governed prior to the cession, are not now in force according to the strictest construction of law, at least reasonable doubts may be entertained on that subject, and that in bad times they may be made the instrument of oppression.

That our penal statutes remedy none of these defects :

They repeal none of the ancient laws :

They give new penalties for offences punishable by former statutes, leaving it doubtful whether they are intended as substitutes for the old punishments or as additions to them :

They punish slight offences with undue severity, and impose inconsiderable penalties on more dangerous crimes :

They give in some instances to the judiciary a discretion trenching on legislative power, and wholly deny it in others where justice and humanity requires its exercise :

They leave unpunished many acts and omissions injurious to society, while some others are made offences which might be repressed by public opinion or private suit

They are multiplied without necessity on the same, or different modifications of the same offence, giving occasion frequently to doubts whether the new statute is intended as a substitute for or an addition to the old.

They are deficient in precision of language and in the order required by proper arrangement

Such laws are unworthy of an enlightened, and dangerous to a free people; and if you had not given the pledge contained in your law of 1820; if you had not attracted the attention and excited the hopes of the good, and the wise, and the liberal throughout the civilised world—attention which is still earnestly fixed upon you! hopes which you cannot without dishonour fail to realize; if you could be insensible to the noble distinction of emerging from the subordinate rank of the youngest member in the union, taking the lead in a most important reform, making by your example a new era in the history of penal jurisprudence; if you could consent to renounce the glorious privilege of conducting your country to the best pre-eminence among nations, and associating your own names with those of the benefactors of mankind; if you could be influenced by the timid fear of innovation or the senseless clamour of prejudice to throw away this rare occasion of founding a glorious reputation for yourselves and for your country, on the solid and permanent basis of public good; if it were possible for you to be blind to these advantages, deaf to these arguments, yet you could not, without an entire abandonment of official duty, any longer delay to remedy the evils which are thus brought to your view, and others as great which cannot escape your discernment.

Legislative functions are in the most ordinary times attended with high responsibility. Yours, from the duty which your predecessors have imposed upon you, are peculiarly so. From the performance of this duty there

is no escape. The merits of your plan will be judged before your eyes. Parliament have already declared that they exist, and that a law is established upon principles and laid down rules, by which he who is to be tried for their violation, has no more to contend for your consideration. You cannot avoid it. It is impossible to exhibit the evil as imaginary. You must, then, either declare that the principles for correcting them, heretofore unanimously established by the representatives of the people, are erroneous, or that the plan prepared is not drawn in conformity with them. In either alternative the duty of correcting the principles or reforming the work is one that must be performed. For, disguise it as we may, it is a truth which must be told and ought to be felt; that, circumstanced as you are, should you shrink from the performance of these duties, to you will be attributed the future depredations of every offender who escapes punishment from the ambiguity of your laws, the vexations of all who suffer by their uncertainty; the general alarm caused by the existence of your unknown and unrepealed statutes; the depravity of those who are corrupted by the associations into which they are forced by your prison discipline; the unnecessary and violent death of the guilty; and, worse than all this, legislators! the judicial murder of the innocent who may perish under the operation of your sanguinary laws. All this, and more will be laid to your charge (a), if you do not embrace the opportunity that is afforded to reform them; for the continuance of every bad law, which we have the power to repeal, is equivalent to its enactment. Whether the mode of reform now offered is the one most proper to be adopted is, with unfeigned diffidence, submitted to the superior wisdom of the general assembly; but that some change is necessary, is boldly and without fear of contradiction advanced as an irresistible conclusion from the view that has been taken of the state of

(a) "The great should reflect that they are immediately, and in effect, the cause of every false citizen who suffers death in consequence of the laws." — *Eden, Penal Laws.*

our penal jurisprudence. Of what nature shall that change be, and to what extent shall it be carried, are questions which come now to be considered. A repeal of all the Spanish penal laws, and of such of our own statutes as throw any uncertainty in the construction of those which we choose to retain, would relieve us of part of the difficulty, but this would be a palliative, and give us only a partial relief. Other cases must be provided for by new statutes, and what security can we have, while this patchwork system continues, that in a few years the same or greater incongruities will not be found in your laws? But supposing this difficulty to be surmounted or not to exist, a greater remains. Where are we to look for our rules and forms of proceeding, from the arrest to the execution? In what statute are contained the rules of evidence, and where shall we find the regulations by which our penitentiaries and other prisons are to be governed? The Spanish laws of procedure, if they are unrepealed, do not fit our institutions; their rules of evidence, we have seen, will exclude nearly all testimony but that forced from the lacerated limbs of a tortured accomplice and their prison discipline we surely shall not be tempted to establish. We cannot again resort to the concise but comprehensive legislation formerly employed. We cannot refer to and adopt the common or any other law, either *en masse* or generally, on any given branch of jurisprudence. That door is constitutionally closed. No more legislation by reference. This device, excusable from necessity (b) in the infancy of our political existence, is wisely prohibited to our maturer understanding. Representatives can no longer jeopardize the

(b) The first legislative council—highly respectable men, but not qualified by their education or pursuits to the task of legislation—did all that could be expected from them. They called to their assistance in this branch a gentleman (James Workman, Esq.) whose natural as well as acquired powers eminently fitted him for the task, and whose principles and integrity always direct his exertion in the public service. His high professional as well as private character justified the choice. But they committed the great error of limiting him as to time. What human exertion could do, he performed. He could not, as I know he wished,

fortunes, reputations and lives of their constituents by the use of an unintelligible phrase they must understand and express what they mean they must do it clearly and in detail. Foreign laws can no longer be imported by the package, or described in the act of introducing them as goods are in the bill of lading, "*contents unknown*," but in the imperative words of the constitution the general assembly "shall in all cases specify the several provisions of the laws they may enact."

On these parts of the subject then—and they form three-fourths of the system—the question is reduced to one of mere form. We must have detailed laws. Shall they be framed into codes, or dispersed in different independent statutes? By whatever name they may be called, you must enact rules and prescribe forms; you must provide laws to regulate the admission and weight of testimony, and a plan for the government of your prisons.

The advantages of having these reduced to order, under proper heads, and making them component and consistent parts of the same system, are so obvious, the state has already derived so much benefit from a similar improvement in the civil branch of its jurisprudence, that it would scarcely seem necessary to say anything on this subject; but as this part of the plan has not escaped censure, it may be proper to offer a very few and very brief remarks, to show its utility.

Laws, to be obeyed and administered, must be known; to be known they must be read; to be administered they must be studied and compared. To know them is the right of the people. Their administration is the duty of the magistrate. But that mode which with the least trouble, in the shortest time, and at the least expense,

offer a complete system. All he could give was a general summary, and a reference to other laws for cases unprovided for. It is to be regretted that full scope was not given to the talents of this gentleman; the feebler exertions of those now employed would have then been rendered unnecessary.

brings the enjoyment of this right and the performance of this duty within the reach of those to whom they are appropriated, that mode is the best; and were two systems submitted to our choice, we should, for the purpose of making a selection, only have to compare them and determine in what degree they severally were calculated to produce these effects. But here the question is not which of two systems is the best; but whether it is better to have a system or none; for there is not, in our present criminal legislation, the least appearance of plan or arrangement. Yet if this character deserves the epithet which is given by the poet, when he calls it emphatically "*lucidus ordo*," how can we expect that the necessary light will be shed on our laws without it?

A representative is instructed by his constituents, or led by his own observation, to bring in a bill to repress a prevailing vice. A preparatory step is to know whether it has already attracted legislative notice. To discover this he must examine all the acts concerning crimes and punishments, for the titles of none of them designate the particular offence which they forbid. He, perhaps, finds a provision on the subject, crowded into a section (a) with others to which it bears not the least relation. But has it not been repealed or modified? Another painful search in which he discovers a second law (b). Is it consistent with or repugnant to the first? Another question which he has not the time, or skill, or patience to resolve; and he brings in a third bill to increase the doubts and perplexities of his successors.

(a) See the 28th and 31st sections of the act of 4th May 1805. In the first, breach of prison, taking a reward to return stolen goods, compounding felony, and conspiracy to indict an innocent man, are confounded together in a clause not longer than this note, and all these offences are subjected to the same penalty. In the second, rioters, breakers of levees and libellers, are most heterogeneously mixed.

(b) See the several acts concerning forgery, larceny, burglary, &c. No reference is made to them here by title or date, that the readers of this report may, in the search for them, and in the task of reconciling them after they are found, have a small specimen of the difficulties mentioned in the text.

Is the task of the magistrate to be made more difficult, or will suppose a commission of the peace to be empowered to commit offences which are not punishable by death, or not exclusively cognizable by the superior court, that he must commit to prison. But what is to be done with him if the crime is not punishable in that manner, yet is one of those of which the superior court had exclusive cognizance is not said. He cannot under this law take bail, for it is a case excepted by the first clause. He cannot commit, for the authority is not given by the second, which is confined to the two cases of crimes punishable by death, and a refusal to give security. First difficulty for the magistrate. He happens to look into the constitution, and he finds, "that all prisoners shall be bailable by sufficient securities unless for capital offences;" how shall he reconcile this with the law, which excludes other offences, namely, those which are exclusively cognizable by the superior court? Second difficulty for the magistrate. When these are surmounted, he must inquire what is a capital offence, and what offences are exclusively cognizable by the superior court? This leads to an examination of all the penal statutes. As there is no classification, no order, not even a general index, he must examine every law and every section of every law; for, as we have seen, our statute offences are strangely associated, and there is no knowing where the provision he seeks for may be hid. Third difficulty for the magistrate. But we will suppose him a persevering intelligent man, and that this also is answered. He has another not less stubborn in his

way. If the offence in question is one of those enumerated in the act of 1505, he has to look to the common law of England for its definition, for the rules of evidence which he is to take, and for all those proceedings which are not among those prescribed in the act. If it be an offence against a statute of a subsequent date, he has no rule, and neither Burn, nor Blackstone, nor Coke himself, can tell him how he is to proceed.

As to the citizen who is neither representative nor magistrate, I need not enumerate the difficulties that stand in his way, for he never attempts their encounter; and it is no bold assertion to say, that not one in an hundred, even in the educated part of the community, can, in the nature of things, have even a superficial knowledge of the criminal laws by which he is governed, and which he is expected to obey.

All these and a thousand other evils might be avoided by a simple arrangement of the penal law under its different heads, and in short sentences; where every thing required to be known might be found in its place, and might be understood when it was found; where the eye of the legislator (*a*) might, at one comprehensive glance, discover, from what was done, what ought to be supplied, corrected or restricted; where magistrates could find simple directions for the performance of their duty; judges, in the precise language of the law, see the limits and extent of their discretionary powers; jurors learn how they are to act, so as neither to abuse nor surrender their important privileges; citizens how to defend their own rights and protect those of others; and the whole community acquire the knowledge of that which all may at some(*b*) time or other have so high an interest in knowing.

(*a*) "The enacting of penalties to which a whole nation shall be subject, ought to be calmly and maturely considered, by persons who know what provisions the laws have already made to remedy the mischief complained of."—*Bl. Com.*

(*b*) The observations of Blackstone, repeating and enlarging on what was so happily expressed by Sir M. Foster, although frequently quoted, cannot be too often repeated for the use of all legislators, who too readily

The consolidation of the penal laws is of more importance than the others, and it is not to be undertaken without the most judicious consideration. It is possible, however, to make a code of the penal laws, which will have the same effect as the present law. It is published in the *Journal des Lègislateurs*, and it is to be printed at the expense of a whole set of the *Journal des Lègislateurs*. It is fortunate if he can procure them, for the *Journal des Lègislateurs* is now out of print, and should duty or accident induce him to wish for a more perfect and useful knowledge of this branch of our law, he may procure a common law library at an immoderate price. All this could be avoided by the adoption of a system, in which, without trouble and at a small expense of our money, the whole penal law would be placed within the reach of all.

No one can be blind to the inestimable advantage our state has derived from its civil code. Yet that code is imperfect, and must necessarily be so. The endless variety and ever changing nature of contracts and other civil relations must always make it as difficult to frame, as it must be incomplete, after the utmost care in its construction. But a penal code is susceptible of a nearer approach to perfection. Nothing being an offence but

imagining themselves and their connexions beyond the reach of any operation of the criminal laws, pay little attention to the evils which they may produce to the community at large. "The knowledge of this branch of jurisprudence," says this celebrated commentator, "which teaches the nature, extent and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state; for no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct should tempt a man to conclude that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us, upon a moment's reflection, that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern."—4. *Bl. Com.* p. 2.

doing that which is forbidden, or omitting to do that which is enjoined by the law ; it follows that as the law can only enjoin or forbid by the use of language, there can of necessity be nothing penal but that which is not only foreseen, but expressed, by the legislature : in other words, that which is contrary to written law ; and whenever an act is not thus forbidden or enjoined, there can be no punishment for doing or for omitting it. If, therefore, the greater difficulties of framing a civil code have been surmounted so far as to render it an acknowledged blessing to the country, why should objections be raised to the easier operation of making a written system of penal law ?

(Other general objections, which apply to any written code that could be proposed, have been urged, and must be answered before we consider the particular provisions of the system now offered. They are :—

First, that it is an innovation, and therefore to be avoided.

Second, that we suffer no inconvenience from the present state of our law.

Third, that it will require much time and trouble to become acquainted with a new system

Fourth, that it may be good in theory but bad in practice.

Fifth, that the terms of the new code will require to be explained by judicial decisions and commentaries, which will produce the same or a greater accumulation of authorities than are now complained of in the common law.

1. The hacknied objection against improvements that they are new, amounts to no more than that they are improvements ; and the fallacy has been so often exposed that the perseverance of those who still use it is truly wonderful, and would deserve our admiration in a better cause. Their objections hold the very reverse of the wise king of Israel's doctrine, that there is nothing new under the sun. With them everything is new, and they use the epithet as synonymous with bad, or at least with dangerous. But the truth is, that with us a body of

written, to the exclusion of trial by jury laws, is no innovation. We had them before the revolution, and our first care afterwards was to provide them be retained to our circumstances in civil cases. And yet not in any of the occult sciences is said to be more certainly made, when the desired effects have been produced under the most unfavourable circumstances. It is the same in legislation, and we may consider that a valuable result as completely ascertained; for our experiment has been thus made. It has succeeded in the most difficult branch; succeeded under every disadvantage of rapid execution, and in opposition to profound and national prejudices; succeeded, too, so completely, as to subvert every objection to the measure itself, and leaving now but to some of the details which more mature reason may remove. This, then, is no further an innovation, than as it applies the same remedy that has succeeded in the complex case of the civil, to the simpler one of the criminal department. It is, on the contrary, the removal of one which was formerly made—the mischievous and dangerous reference to a foreign and unwritten code; and, indeed, there can be no change which does not destroy something that was itself, when first introduced, an innovation.

The truth is, that by repeating a word or a phrase very frequently, and using it always in a bad sense, an indefinite idea of evil gets attached to it, which makes it a very convenient instrument in the hands of those who are at a loss for more legitimate weapons in argument. This is the case with the word in question; and many excellent measures have been defeated merely by repeating it, accompanied by some gesture of disapprobation, and reinforced sometimes by the sage observation of “good in theory but bad in practice,” a phrase of equal import, which we shall presently analyse. In the meantime it is put to the recollection of every member of the honourable body to whom this report is addressed, whether these precise words have not frequently been used as objections to the measure now proposed?

If the objection were that it is a bad or a dangerous innovation, its merits would immediately come under discussion; and this ought to be the object of every one who proposes a change. Of this he would have no right to complain; and the question ought to be so stated as to throw upon him the burthen of showing the expediency and practicability of the measure he advocates; for there is no doubt that every change of laws, or the manner of administering them, must be attended with some inconvenience, and is, therefore, to be avoided. And he is justly to be reproached as an idle or mischievous pretender, who proposes any change without being able to show, not only that it would be useful if adopted, but that it is practicable, and that its advantages will more than compensate the evils of the operation. But he has a right to expect that a good and necessary measure will not be rejected on the vague charge of innovation, which, being strictly true as applied to every change, cannot be denied, and is hurtful only from the improper meaning affixed to the term (*et*).

2. The next general objection is, that there is no necessity for a change; the peace of the state is as well preserved as that of any other in the union; crimes are not more frequent; justice is well administered; and if any evils should result from our present system, it will be time enough to correct them when they arise. How much of truth there is in the allegations by which this

(*a*) The man who has thrown more light on the science of legislation than any other in ancient or modern times, speaking of this kind of objection says, "a few words then are necessary to strip the mask from this fallacy: no specific mischief, as likely to result from the specific measure, is alleged, if it were, the argument would not belong to this head. What is alleged is nothing more than that mischief, without regard to the amount, would be among the results of this measure. But this is no more than can be said of every legislative measure that ever did or ever can pass. If then it be to be ranked with arguments, it is an argument that involves, in one common condemnation, all political measures whatsoever, past, present, and to come; it passes condemnation on whatsoever in this way ever has been or ever can be done, in all places as well as all times."—*Bentham's Book of Fallacies*.

objection is supported may be determined by referring to a former part of this report, in which the present state of our criminal jurisprudence is detailed. No comparison can with justice be made between the situation of other states in this respect and ours. With them the common law is indigenous, they have grown up under it, and modified it to their wants and conveniences. They have not the embarrassment arising from the laws of foreign countries unrepented among them. Their people speak all the same language, and are familiar with all the technicalities of the law. Yet without these pressing inducements, many of them have reduced their criminal code into something like system. A large majority of them have adopted the penitentiary plan, and have given their laws the shape it requires; and the legislature of one of the largest and most influential among them is now occupied with the revision of all their laws, including the criminal code, and throwing them into a methodical form. But whatever be the comparative situation of ours with other states, as to the condition of their penal laws, we know that ours are extremely defective; and although the body politic can move on in spite of these defects; although anarchy does not reign, and the laws, bad as they are, curb offences in some degree, we should scarcely be justified to ourselves, to our country, or to our God, for neglecting the means in our power to remedy the existing and prevent the future mischief of a system so extremely defective as our own. The suggestion that all must be right because we do not see and feel the evil in our own persons, creates a fallacious security, and, it may be, a fatal one. If it were true that no evil has yet arisen from the effects of a system which we see must eventually produce it, we should bless God, and hasten, before it is too late, to prevent those ills which we cannot compensate after they have been suffered. To defer it is as wise as to wait until some traveller has been lost in the torrent that crosses the way, before we build a bridge to pass it.

But is it true that no evil is already felt? Is it only to prevent future, not to remove present mischief that we are called on to legislate? To answer these questions we must look to the general operation of our laws on the character and morals of the whole community as well as to their particular application. Nothing in a free government can be a worse symptom than an indifference to bad laws, because we do not suffer by their immediate operation. In the people it evinces a selfish feeling, a carelessness of the welfare of others, and an insensibility to public good, destructive of every patriotic sentiment. This dangerous apathy is created and fostered by suffering the existence of impolitic or oppressive laws, although circumstances may not have called for their application. We become familiar with them, and learn to consider as innocent that from which we feel no present inconvenience; and, presently, as necessary that which has so long continued; and when, in evil times, these instruments, ready fashioned for the hand of oppression, are brought into operation, it is illegal to resist, and we know not how to avoid the stroke. But in a community such as ours, there will always be a large proportion who have understanding enough to see and fear the danger. To those this apprehension is a continued evil, attended with the humiliating sensation of having life, liberty, reputation, or property at the disposition of another (a), which must always be more or less

(a) In some memoir of the reign of Louis XV. we read of a courtier whose duties called him very frequently about the person of the monarch with whom he was a kind of favourite; but far from enjoying this distinction with pleasure, he was observed always to be extremely agitated in the royal presence. On being asked by a friend to account for this feeling, he said, "I have indeed every reason to be satisfied with my treatment; but whenever I am in company with the king, I cannot avoid saying to myself, there stands a man who whenever he pleases may chop off my head or bury me alive in the Bastille. Judge whether with these reflections I can be happy." The existence of bad laws must have the same effect upon every considerate citizen, that the presence of his master produced on the disturbed faculties of the courtier. The sword, though it never fell, destroyed the festivity of Damocles.

the case under any but a good system of penal laws. There is, then, evil, positive evil, the evil of political degradation or constant apprehension, even though the laws should never be executed. But that is not the case; they have a general, a fixed, and most pernicious operation; one that never for a moment ceases, and for the continuance of which every legislature that meets incurs a most awful responsibility. The only punishments, with the exception of death (not now inflicted), are fine and imprisonment. To some crimes the law adds hard labour; but as no means are provided for inflicting this punishment, the only confinement that is suffered is one of idleness, debauchery, and vicious association. Of all punishments this is the most unequal and most injurious to society and to the individual. As this subject will be fully discussed in the preliminary report on the Code of Prison Discipline, it is not now intended to enter into the reasons which conclusively show that the laws which permit or direct the indiscriminate association of the innocent with the guilty, before trial, and of those affected with different degrees of guilt, after condemnation, are themselves the great causes of the depravity which they profess to punish. Such laws are ours; such are and always will be their effects; and you, legislators! you have collectively the power to remove this evil, to repeal these laws, to replace them by those which are better—worse you can scarcely substitute. Each of you, individually, may cast off the responsibility of their continuance, by an earnest, sincere resolve to adopt what is good and amend what is erroneous in the system that is proposed; and by rejecting with disdain the false, and fallacious, and dangerous lullaby that is sung to your consciences, that all is well. All is not well! The general operation of your laws destroys the morals of the people, saps the foundation of your liberty,

(a) Whipping maintains, as we have seen, an existence of doubtful authority on the statute book, and the pillory is prescribed as a specific against the disorder of one offence only; neither, however, have, I believe, been administered of late years.

and is calculated to spread general alarm. By their particular operation, they endanger the safety of the innocent and favour the escape of the guilty. These last characteristics will be made more apparent in considering the particular provisions of the different codes, more especially that of procedure. Here it will be sufficient to indicate that the severity of some of your penalties, disproportioned to the offence, and repugnant to the feelings of the people, always have and always will induce witnesses to avoid prosecuting, jurors to acquit against evidence, judges to recommend to undeserved clemency, and the pardoning power to be indiscreetly exercised: that the law which has been prescribed for criminal proceedings, in certain cases, by legislative authority, and adopted without any authority at all in others, is eminently calculated for the escape of the guilty, by the numerous objections which it admits to the forms of proceedings: that if instances are not produced to you of individuals suffering innocently, you are not, from thence, to conclude that such cases do not exist; for no act being guilt, but one that is intended to be forbidden by the law, whenever that is so ambiguous, or its definition so loose, as to render it doubtful whether one act or another comes within its intent, the chances—why is it necessary to use this term in speaking of that which ought to exhibit moral certainty?—the *chances* of a decision in accordance with, or contrary to the meaning of the legislator are equal, and of course it is as probable that the penalty may fall on the head of the innocent, as of the guilty (*a*): and, finally, that the

(*a*) The organization of our criminal courts gives a good reason why instances of erroneous decisions cannot be produced. There is no legal mode of examining them—no review!—no appeal! Eight independent judges, each gives his own construction on a mass of laws, the most liable to misconstruction, without any means of comparing or reconciling them. The reporter has not ventured to propose in this system a remedy for this most flagrant evil. He once proposed it, and the bill is on the legislative files. The double influence that defeated it, is still in force. It exists in human nature. Few men like to have their errors exposed, and as few like the trouble of correcting those of others, without additional compensation.

innocent are made guilty and the guilty become more depraved, and both suffer incalculable moral and physical evil by their indiscriminate confinement.

"But we are also told, that the introduction of a new system will be attended with terrible expense, trouble to learn its provisions, &c. &c. to carry it into effect. Of this there is not the least doubt. All laws that ever were or ever will be made are liable to this objection. But whatever trouble they give in learning them, or whatever sum they cost in making, we must have laws, and if we are wise, we must have good laws. If those which now govern us are good, he would be mad, or worse, who should propose to change them. The first question, then, is one that has already been discussed, are our present penal laws good or bad? Their defects have been shown. No man who has considered the subject, can call ours a good system. But as good and bad are relative terms, the present laws not being perfectly bad, nor any that can be offered to replace them perfectly good, our inquiry is reduced to one of expediency. We must compare the present state of things, its advantages and evils, with those of the system that is proposed, and as the scale preponderates, decide to remain as we are, or to adopt this or some other code in its stead. The materials for forming the first part of this judgment are already before you. The evils of our present laws have been exhibited; and if the advantages have not been displayed with equal care, it is because all that has been thought good in the excellent materials which are found in its composition, have been used in the construction of the new system that is offered to replace it. Another part of the operation, the consideration of the advantages and defects of the new system, must necessarily be deferred until we enter on the detail of its provisions.

(a) This is not a repetition, although the enormity of the evil would excuse its being brought frequently to notice. When formerly mentioned, it was to show its general demoralizing effects on the whole community. Now it is introduced as one of the causes of individual suffering;

To dispose of the present objection, we will, first, consider the evils attendant on every change that may be proposed, and compare them with those which we now suffer, or must expect as inevitable, from a continuance in our present state

First, the prominent objection of the trouble and inconvenience of learning a new system. To give any weight whatever to this reason, we must suppose a state of things which does not exist; we must suppose that the present laws are known—known to those who are to obey, as well as to those who administer them; because, in all evils in government, it is amongst the greatest, that the laws, particularly the penal laws, should be a mystery to the people, and the knowledge of them confined to certain designated classes or descriptions of men. They invariably make a property of them in the strictest sense of the word; a property that must be paid for, whenever it is wanted for use; and, like other articles of commerce, is not always sold in a pure unsophisticated state; and the unfortunate purchaser of the adulterated commodity has no means of determining whether it be good or bad, until he has incurred some loss, or made himself liable to some penalty by trusting to it. And, to carry on the metaphor, the seller himself may have been equally deceived in them, for a written code is the only public inspection office at which the stamp of authority is given to legal opinions, and by a reference to which their correctness may be tested. But it has been shown—it is believed to demonstration—that with a very considerable portion of its penal laws, three-fourths of the people of this state cannot, in the nature of things, be acquainted; that the other fourth can know it but partially; and to any one who has attended our courts, it must be evident, from the number of contradictory cases and authorities cited, sometimes on the simplest points (*a*), that even

(*a*) For proof of this assertion, if any be wanted, open at random any report of a criminal trial at common law. In the case already referred to, of the Territory *v.* Barran, fourteen cases were arrayed on the one side, and were met by an equal force of fourteen on the other; each of

those who have made it the study of their lives to expound these laws, and those whose duty it is to apply them, are not yet masters of their professions. Each advocate relies on his own authority, and the judge, perhaps, decides according to a third.

The present law, then, is wholly unknown to some of its essential parts to a large majority of the people, because those parts are either not written at all, or written in a language that is not understood, and, to say no more, it is not perfectly known to those who are

themselves equally law, because each was pronounced by Sir William Blackstone 'living oracles', and yet about six of them must have been silent if the other fourteen were true.

In another case, the offence was, in the indictment used to have been committed "in the city of New Orleans," which words I have to be in the First District, and lest that might be forgotten, the words "First District" were put in the margin. A counsel objected to the indictment, but a motion was made to amend the indictment, to insert the words "in the district aforesaid," were not admitted after the words "New Orleans." Twenty authorities, equally conclusive, were cited on this important question. And it was decided, that the words were necessary; and the defendant, although found guilty, escaped punishment. Will this decision be a rule in future cases? To use a favourite phrase to express judicial legislation, does it *enforce* the law? The general assembly may judge from the following statement.

In the case of the Seven Bishops, three judges decided that surety of the peace might be required in the case of a libel. One judge dissented. —In the case of John Wilkes, Lord Camden, in declaring the opinion of the court, according to the report, says, that the dissenting judge (Powell) was the only honest man of the four, and subscribes to his opinion, declaring that "it is absurd to require surety of the peace or bail in the case of a libellous suit."

In the case of Nugent, the superior court of the territory of Orleans, decided contrary to the opinion of the court, as declared by Lord Camden, and required the defendant to give security for his good behaviour. What has been decided in the eight several independent courts of criminal jurisdiction, since that time, I cannot say. What sides they have taken between Lord Camden and Judge Martin, I cannot pretend to know. But I ought to add, that one reason alleged for not subscribing to the opinion of his lordship, was, that it was believed to be inaccurately reported, thereby adding the high authority of our own judiciary, to the support of what I have said, as to this source of uncertainty in the English law—an uncertainty not theoretically feared, but practically felt in forming the decision just quoted.

paid (a) to explain and administer it. Here the proposed system has a decided advantage; for it retains almost all that is now known, and renders that accessible which could not be approached before. It can be read in the language of the reader. It can be read in one book, without being obliged to have recourse to a hundred. Its terms are simple and intelligible, or are made so by explanation. It is methodized, and the part that is required, may be found without trouble. If it is adopted, the law no longer is a snare for the unwary; all its penalties are exposed; whoever incurs them must do it wilfully; the good citizen clothes himself in their protection, for they teach him all his rights and all his duties; the knave knows and fears them, for he sees that they cannot be evaded nor broken with impunity; the diligent may easily acquire a knowledge of all their contents; the more negligent knows where the provisions that suit his immediate occasions are to be found when they may be wanted, and no one will have occasion to pay another for expounding laws, which, being intended for general use, are suited to the capacities of all. These will be the effects of a good system. Nearly the reverse is experienced under the present. And I think it may safely be asserted, that less time will be required to obtain a perfect knowledge of any law that is reduced to writing, and framed with a tolerable attention to clearness and method, than will be necessary to learn that part of those which now govern us which is unknown even to its professors. But should it be conceded that this supposition is unfounded, and that greater trouble would be required than is supposed, to master the differences

(a) Any reflection derogatory to the learning, ability, or integrity of the respectable judges and other magistrates, who administer our criminal law, would be so unbecoming, not to say unjust and disrespectful, that it is hoped nothing of this kind will be understood by the report, or imputed to its author. What is meant by this, and similar observations in this work, is, that the laws themselves are in such a state, composed of such heterogeneous materials, drawn from such obscure sources, and so confusedly put together, that it is impossible for the most assiduous application and the quickest apprehension to master them.

between the old and the new system, to those who have studied the former, yet that can be only to ourselves to those who are now actually acquainted with it. But those who are put under the necessity of studying there the countless suggestions of the law, judges, advocates, magistrates and officers, who put it in place, though the multitude even in the present day who have not yet studied the present law, are bound to obey them; the millions were bound to follow them in the lapse of those ages which every good citizen must wish his country and its institutions free from; is the curse of bad laws and the odious and painful task of learning them, to be entailed on the people, or to give ourselves the task of a few days or weeks in total apoplexy. But this inconvenience, what can be its amount, cannot be avoided. The new system must be studied. It cannot be rejected without examining and weighing its provisions, and if in performing this duty, those who study it to find out defects and corrections, would give but half the care in amending what is wrong, or pointing out and advocating what is right, we should hear no more of their objections to adopting it. This argument is addressed to enlightened legislators, who know that their labours are not to be confined to the ephemeral operation of the present day. To those upright magistrates who are ever ready to sacrifice their personal convenience to the permanent good of their country; to the high-minded members of an honourable profession, who cannot but see the uncertainties and incongruities of our present laws, and who would seem to make public evil contribute to their private good: these classes comprise generally all who, having any knowledge of the system now in force, would find some little part of that knowledge useless by the introduction of a new one; and to either of these it would be insulting to express a doubt of their readiness to devote the time necessary for this new study; or that they would for a moment put in competition a trifling and temporary personal inconvenience with a lasting and important benefit to their country.

It must be observed, that I am now answering the objection of trouble and inconvenience only, as applicable to any change, and that, therefore, it is permitted to consider the change as an advantageous one; for it will most readily be conceded, that neither trouble nor expense ought to be incurred for replacing a bad system by one that is not better.

The arguments on this head have hitherto been based on an assumption that we had a choice either to remain as we are, or to change; but if the facts already stated are true, and the deductions from them are correct, there is an absolute necessity for the change. The Spanish laws must be abrogated: the incongruities in your own must be corrected: rules must be provided for defining, prosecuting and trying the offences not enumerated in the act of 1805. and a penitentiary must be provided and laws must be made for regulating its discipline, or else some other mode of punishment must be substituted for the one to which the criminal is sentenced, but which there are no means to enforce. There is a moral obligation to do this. No part of it can be omitted, consistently with the first duties which representatives owe to their constituents. There is a necessity for all this and more; unless we choose to abandon the high station on which so lately we were placed by the resolutions of your predecessors; unless, without motive and contrary to duty, and interest, and reputation, we recede in the path of improvement which we ourselves have traced, while others, to whom we led the way, advance; unless, after having received by anticipation the prize in the race of reform, we sullenly refuse to proceed, and suffer other nations to snatch it from our hands; unless we cease to be intelligent, great, enlightened and free; cease, in short, to be ourselves, and become what Louisianians never can be, regardless of national honour, careless of the reputation they have acquired, insensible to their own interest and the happiness of their posterity; a physical as well as a moral impossibility! For nature must counteract her own work; must take away the high

expenses, much better than any argument, what additional burden must be borne by the funds of the state, the moderate amount of which will astonish those who have not calculated the difference between maintaining a prisoner in idleness, or obliging him to labour for his subsistence; for it will be found that the saving made by the latter mode of treatment, calculated on two hundred prisoners, will very nearly pay the interest of the first expenditure required for all the proposed establishments.

It is true the sum required must be advanced by the state but if their present funds are relieved to the amount of the interest of that sum, the only present inconvenience is the opening a loan for the principal sum, to be repaid at a future day. Before which time the next and most important pecuniary saving to the state, in the diminution and prevention of crime, will more than enable the next generation to pay it; for it can be shown as nearly to demonstration as the subject is capable of, that every juvenile vagrant or offender that you educate and reform, is on an average a saving to the state treasury of more than two thousand dollars (*a*), which would be expended under your present system in the expenses of repeated convictions and maintenance during his successive confinements; while there is no calculating the unequal tax that he levies upon particular citizens by his depredations. This subject will be resumed and more fully developed in the introductory report to the Code of Prison Discipline.

4. I now proceed to the objection to a written code—that although good in theory it is bad in practice.

So far as this objection is intended to apply to any part of the system now offered for your consideration, the answer must be deferred until the details of that system

(*a*) A committee of the legislature of New York, state the case of a prisoner in one of the penitentiaries, who was first convicted when he was ten years of age, and had been, for repeated offences, twenty eight years in confinement. This man alone, at the rate we keep our convicts, would have cost the state more than five thousand dollars, besides the expense of removal and conviction.

come to be examined; here it must be discussed as an objection to any written code whatever of penal law. This is a common expression, used most frequently without attaching to it any precise meaning. It conveys a vague idea of something wrong, and is employed chiefly to avoid the difficulty of answering cogent reasons that are offered for the adoption of any untried measure. As relates to the present subject, it is a peculiarly unfortunate argument in this state; for, as was formerly observed, it is not untried. It is not theory alone. It is practice in the more difficult branch of civil jurisprudence, and the facility and success with which that operation was performed, if we may trust to the strongest analogy, must ensure the like results to this. Having heard under this head nothing but the naked unsupported assertion, a sufficient answer to it would be, that it curies with it its own refutation; for, if in the terms of the objection, the plan be good in theory, it cannot be bad in practice. A system of laws to be good in theory, must be well adapted to the end proposed (*a*); must be suited to the people they are intended to govern; must be certain, convenient and constitutional; in short, must be good when reduced to practice. If the theory fail in any one of these things which are necessary to put it in execution, it must be supported by bad reasoning. There must be some fallacy, which, being exposed, would show it to be bad. Such a theory ought to be assailed, not by asserting it to be good in itself, but incapable of being executed; which is a contradiction in terms; but by showing why it cannot be reduced to practice, that is, by showing it to be a bad theory.

5. The only remaining objection to reducing the laws to writing is this, that every new system necessarily supposes the use of new terms, and those must have their meaning settled by judicial decisions before their import

(a) *Lex, bona censeri possit, quæ sit intimatione certa, præcepto justa, executione commoda, cum formæ politice congrua, et generans virtutem civitatis.* Bacon was not a vain theorist.

can be understood ; that these will create the very uncertainty which the code is intended to remedy. And in support of this opinion it is said, that the Code of Justinian, although written, has produced as many contradictory decisions and as voluminous commentaries as the common, which is unwritten law ; and that the Code Napoleon, though but of yesterday, groans under the weight of works intended to elucidate it. If the terms of the new law are comprehensive, it is said, they will include more, if precise, less than the legislator intended ; the judge must determine, from a wise examination of the words and a prudent attention to the spirit, what was the real intent of the law. This has already been done in the common law. Its terms are explained. The cases which come within, and those which are excluded, are known. To unsettle them would create confusion ; and therefore, we had better suffer the inconveniences we have, than fly to others that we know not of.

There is some truth, but more plausibility, in this argument. It does not, like others, found itself on popular prejudice exclusively, but has weight, great weight, with many prudent men, who do not detect the fallacy of the argument, or perceive how little the facts on which it is founded, apply to our circumstances. I have some hope of enabling them to do both ; and if the enemies to written law, the partisans of the jurisprudence of decrees, are driven from this position, I shall be justified in believing the field clear for a consideration of the merits of the plan that is now offered.

Before we examine the reasoning we have stated, a preliminary observation or two is necessary, on the difference between the penal and civil law, to which last all their facts and all their reasonings apply. Civil law, from its nature, must govern all cases that may arise in the infinite series of conflicting claims and disputed rights between individuals ; claims, which arise from the ambiguity or silence of the laws ; rights, which are created by the continual changes that occur in the state of society, in commerce, in the arts. Criminal laws on the contrary,

are infinitely more contracted in their operation emanating from the sovereign will, they admit of no alteration but that which it declares. Never to be altered or commuted, nor the acts in all their progress, nor the whole movement. Be they ever so important, not even political events, be they ever so general, be they civil association, can have the slightest effect on the penal law. The cry is all for change, but the cry produces none. That law lives in itself, and can neither be changed or modified, so as to be accommodated to one or those circumstances, but by positive legislation. What the law forbids, is an offence; but the law cannot forbid without being perfectly intelligible, "*incertum non nocet delictum, qui se parabit ad pugnam? incertum non vocat delictum, qui se parabit ad parendum?*" The trumpet may sound for ever, but no one prepares for battle unless the appointed signal be given. The laws may peel, but can never be obeyed unless they are understood.

An ambiguous penal law, is no law, and judicial decisions cannot explain it without usurping authority which does not belong to them. To extend the law to a case that does not come within the plain meaning of its words, is to make a new law. Nothing, it appears, can be clearer than the reasoning which shows this. Suppose a law should pass, declaring that if Peter left the state, his property should be forfeited. To declare, by a judicial decision, which of the many men bearing that name was meant, would certainly be a new law; because the individual really intended could have no notice that the law applied to him; there was no intelligible prohibition; the law gave an uncertain sound and he could not prepare himself to obey.

Not quite so in civil law. Its office is to prevent individual rights from being infringed, or to grant compensation for any encroachment upon them; and in doing this, there is an absolute necessity of deciding on cases not previously provided for by positive law; in other words, there must be a power of construction, for this plain reason, that whichever way the judge decides, his

sentence affects private right. If it were a right claimed under colour of a positive law, and supposed to be created only by it, and that law were ambiguous, the same reasoning would apply in civil that we have used in criminal cases. The obligation to respect that right, in such case, having no other origin but the positive law, if that were uncertain, the defendant against whom it was claimed, not having any intelligible notice of the duty required of him, could not be constrained either to perform it or to make compensation for omitting it; and the decree must be against the plaintiff, in the same manner as it would be against the state, on a prosecution under an ambiguous penal statute. But in the decision of ordinary questions this is far from being the case; there, as has been said, the judge must decide, and his decision must establish a right. Take the common occurrence of a suit on a contract of sale, where the defence is concealment or fraud: here the judge, in deciding for the defendant, takes away the apparent right of the plaintiff to recover on his contract. In giving judgment for the plaintiff he determines, the facts being conceded, that the concealment is not of sufficient importance to vacate the sale. If the case be a new one, he must decide without positive law; he must frame his judgment by analogical reasoning from the law in similar cases; and if it be correctly drawn it will be respected for its wisdom, and abridge, by its adoption, the labour of further investigation in subsequent discussions of analogous cases. Thus the jurisprudence of decrees, or the authority of precedent, is by degrees established in civil cases; first, from the necessity of deciding between conflicting claims, and afterwards from the very great advantage of having settled and fixed principles, *stare decisis* being a maxim that usurps the place of regular legislation; but its misfortune, like that of all other illegitimate power, is this, that its authority is uncertain and vacillating; it is law, or not law, according to the discretion or passions of subsequent judges, of which hundreds of examples might be given, more striking than the one hereinbefore referred to.

The effectual and obvious remedy for the proposed legislative review of the substance of the law, for the purpose of its amendment, may be and can be found in the very matter itself, in the proper judicial review of a code previously made and then enacted in the name of legal authority, but not its execution, need to any legislative act, it is in effect a declaration of the judicial wisdom of the people with the legislative consent and making that law, which under some construction cannot but be considered as an encroachment. From the glance at the nature, use, and purpose of the review procedure, and the hint at one of its remedy, with the remedy suggested for it, it will appear that although there is an apparent necessity for giving some authority to decision in civil cases, there are none in criminal; secondly, that the necessity is not apparent even in civil cases and arises from the neglect of the legislative branch to assert its rights and perform its constitutional duties; thirdly, that any contract on which a court can put on the terms of a penal law must either give them an operation different from that contained in the plain obvious meaning of those terms or it must be in conformity with such plain meaning, and then it follows conclusively, that, in the first instance, it would be improper to give the authority of law to such construction, and in the last it would be unnecessary; fourthly, that if a penal law have no such plain obvious meaning in its terms, it is deficient in an essential requisite to its very existence, and can have no sanction.

These deductions all relate to decisions on the text of those laws which impose a penalty for their contravention. But there are other questions in criminal law, relative to evidence and procedure, in which all the care that may be employed to provide for their solution will be found insufficient. To those all that has been said on the subject of precedent in civil cases applies; and it will be found that means are pointed out to give to every judicial decision, on these points, the force of law, whenever, after a legislative discussion, they shall be found to

be correct. Add to this, that especial care has been taken, in framing the new code, to preserve the terms now in use, where the same sense could, consistently with the order of the work, be applied to them, and that whenever new terms are found to be necessary, or old ones have a new or more precise signification annexed to them, they are fully explained in the Book of Definitions; and then, from a consideration of the whole subject, it will be found that the objection is more plausible than well founded; and that if any decisions are necessary to explain the terms of the new system, they will be much less numerous, and will have greater authority, and can be learned at less expense, either of time or money, than those which are still necessary to elucidate the dark parts of our present laws. The argument drawn from the number of commentators and contradictory decisions on the two written codes, those of Justinian and Napoleon, is plausible, and of course very commonly used; but it has little weight even against a civil, much less against a penal code; and, among many other reasons that might be urged in a dissertation on the subject, for this conclusive one, that both those codes contain the radical fault of admitting a recourse to an authority beyond that of the codes themselves. The authority of the emperor in the Latin and usage in the French system. The best code that can be provided is but a frame-work on which a better is to be constructed. It must provide for its own progress towards perfection; but it provides for its own corruption and final destruction if it admits judicial decisions, unsanctioned by law, to eke out its deficient parts, to explain what is doubtful, or to retrench what may be thought bad. The remedy is easy, efficacious, if it succeed; innocent, if, contrary to all reason, it should fail. It will be found at large in the project of a law for adopting these codes; and it is confidently believed, its operation will show that there is no more force in this last objection than in those which preceded it.

Enough, I hope, has been said to clear the ground of

the general and concrete objects that have been raised on the subject, every individual is directed by a force which impels him to contribute to the attainment of the end which he has in view. I have spoken of this force as if it were a single one, but it is partly the force of public opinion, partly the force of personal duty, partly the force of the law, and lastly the force of the conscience, which they have in common.

I am now about to approach the principal point, and to enter upon the discussion of the several provisions of the system, which very different holdings. So far as concerns the general principle, on which they were directed to be formed, I feel the same confidence, for I am supported by the same authority. But in examining how well the principle has been reduced to the form of practical precept, I tremble but I do not doubt which the uncertainty of review, the same approbation naturally creates: though even this is aided by a consciousness of having exerted every faculty in the endeavour to make the work worthy of those who directed it, and a blessing to those for whose use it was designed. Before I enter upon this discussion, however, and come to the consideration of the provisions of each particular code, it seems proper that I should conclude these general introductory remarks with some observations on the characteristics of the whole system, which, although they may have been incidentally adverted to elsewhere, yet merit more particular attention, on account of their novelty, and, as it is also thought, of their importance.

The legislature of Louisiana has given the first example of proclaiming to their constituents and to the world the principles by which they would be guided in the great work of penal legislation. A very short law contained these principles, concisely but clearly declared to be the basis of the code which they directed to be prepared. These were developed in a subsequent report; and both, translated into different languages and published in dif-

ferent countries, have excited an interest abroad which certainly would not have been created by any ordinary change in the jurisprudence of a small and distant state. Nor was there any thing in the report that could account for the attention it has received. The style is not marked by any peculiar excellence, and most of the arguments it contains had been before used and urged with better method and greater force. What, then, is it that has attracted the attention of the statesmen of Europe to the legislation of one of the least states in our union ; and of its jurists and men of letters to a pamphlet, which has no other merit than that of containing true principles, simply stated, and elucidated without the aid of eloquence ? It is the novelty of hearing governors, for the first time, addressing the people in the language of reason, and inviting them to obey the laws, by showing that they are framed on the great principle of utility ! It is the imposing spectacle exhibited by a nation, already freed from the shackles of political servitude, bursting those which the prejudice of ages had riveted on the mind ! It is the surprise occasioned by the simplicity, and ease, and safety of an operation, which ignorance and interest had represented as perplexed, dangerous, and difficult ! Other rulers have sometimes deigned to explain the motive for making a particular law. Ours alone have offered a general system to the consideration of the people ; and told them, not only that it was expedient, but explained why they thought it so ; invited them to reflect as well as to obey ; made their precepts lessons of pure morality as well as of law ; and showed that, consistent with the public good, they never can be separated. They say to them, for the first time in the history of jurisprudential legislation :—"We are about to frame rules for your government, in your various relations to each other and to your country. Those, by which you and all other nations have been bound, have hitherto been couched in language only understood by a few, who naturally made a property of their knowledge. All mystery is now at an end. Here are the laws, and here are the principles

by which we were guided in framing them! Judge whether the principles are correct! Determine whether we have conformed to them! It has been said by those of old, *sic volo, sic jubeo, stet pro ratione voluntas*—obey the law because it is written: but we say unto you, obey the law because it is just, because it is for your benefit, because the principles on which it is founded are wise! The law has its source, not in our will, but in reason, truth, justice and utility: of all which our will is only the organ and the record. When you find that we promulgate precepts not consistent with their dictates, although they must be obeyed while they are in force, yet the evil is remediable, for with the law we give you the rule in conformity with which it was intended to be made. If, then, the rule be bad, or the law be not conformable to it, the remedy is in your hands: dismiss us, and repeal our law." It is the unprecedented nature of this frank, simple language, that distinguishes your projected code, and that makes it an object of curiosity and interest; a theme for argument; and, possibly, a model for imitation in its leading characteristics.

Another peculiarity in the plan now presented is, that it is a system of which all the parts are connected with, and bear upon, each other. All the written criminal codes hitherto established have been defective in this particular. With those of Draco, Solon and Lyeurgus, we are not sufficiently acquainted to say more, than that the fragments of them that have descended to us, do not justify a belief that they contained anything more than a few arbitrary enactments, assigning particular punishments to designated offences, without any provisions for preventing the latter in any other way than by the terror of the former, without any rules of procedure, and mingling together, without order, the civil and criminal branches of jurisprudence. The same characters may be given of the laws of the Twelve Tables; and even that wonderful collection of human wisdom and foresight, to which modern nations still have recourse for the best principles of distributive justice—the body of the Roman

Law—was wofully deficient in the arrangement which ought to draw the line between civil and criminal law. The laws of the Partidas in some measure correct this evil; but although the criminal code is there thrown into a separate division, yet penalties are profusely scattered among civil remedies; and these latter are often found usurping the place of punishments.

Of modern codes, the Russian, Prussian, Tuscan and Imperial are more or less liable to the same reproach; but the penal code of Napoleon in a great degree avoids it. This defines offences, and a code of procedure directs how offenders shall be tried and punished; but here it stops. Yours, on the contrary, in addition to the enunciation of principles on which I have already remarked, contains the further essentials to a complete plan, a code of evidence and a book of definitions. The book *de verborum significatione* in the code of Justinian is somewhat analogous to this last feature in yours, but it differs in this: that the whole body of the Roman law being only a digest or compilation of those before in force, the words in which it is expressed were those originally employed, and, being the work of different hands, these words were retained, and the book in question was added as a kind of lexicon to explain them. Your code being an original work, the reporter was not restricted in his selection of terms, and when those he used were susceptible of more than one signification, or were in their general use uncertain or ambiguous, he was at liberty to annex to them a precise signification, taking care that, in the course of the work, they should be used in no other. The great utility of this part of the system is obvious, provided it has been executed with the necessary precision. It is that part which has been found the most difficult. The most intense application was necessary to define terms the most commonly used, but to which many of those who employed them affixed ideas more or less materially different. This difficulty is increased by the nature of the language, which very frequently does not afford terms sufficiently precise to avoid difficulty, even in the peri-

phrase used in the definitions, so that in many instances I have been under the necessity of defining the words employed to explain others. And, in order to approach nearer to that certainty so necessary in all laws, recourse has been had to corollaries, examples, and illustrations, as well in the body of the law as in the book of definitions. This is also a new feature in legislation; and, like many others that had not yet received the sanction of experience, it was made the subject of solicitous reflection before it was adopted. An author, whose maxims in law and legislation are entitled to the highest respect (c), and whose rules I have more than once taken as my guide, has said that the lawgiver ought not to *reason*, but *command*: the false construction usually put upon this precept need not now be examined; here it will only be necessary to say that the illustrations alluded to are not *reasonings*, and therefore do not contradict the maxim; they do not purport to give the reason of the rule, but to show clearly what it is. Sometimes this is done by enlarging, sometimes by restricting, and sometimes by the elucidation of example; but all are only so many amplifications of the rule in the text; all are precepts. The lawgiver takes upon himself that part of his duty which has heretofore been improperly devolved upon the judge: the law as it now stands gives the simple precept, the judge makes the deductions; he declares how far the law is intended to extend, what classes of cases do not come within its purview. If language furnished words sufficiently numerous to express every idea, and sufficiently definite to admit of no other construction than the one intended, the legislative function would end with a simple exposition of its will in the requisite terms; but unfortunately this is not the case. Languages were formed in the infancy of society, and of course would contain terms commensurate only with the few wants and simple ideas prevalent in that state of society. As the necessity for other words increased with advancement in

civilization, the supply was furnished either by periphrase, by figurative language, by adoption of words or phrases from other tongues, and, in very few instances, by the creation of new terms—all of these, except the last, the fruitful sources of amphibology and doubt. This is not the place to enter into a discussion of the philosophy of language, but it was necessary to advert to the source of this difficulty, in order to show that from this defect in every language, the lawgiver could, in none, find terms sufficiently precise for the expression of his will, in all the cases which might occur. And therefore, although the avowed object of every legislator was certainty, yet in the body of all laws, sometimes from the negligent or unskilful use of the language, sometimes from its internal defects, the legislative intent is so uncertain, that the chief employment of the judiciary power has been, not its proper function of ascertaining facts and then applying to them the provisions of a known law, but in the legislative task of declaring what the law is. Good laws, expressed in precise language, would destroy this confusion of powers. Such laws admit of but one interpretation, or, more correctly speaking, they admit of none. The judiciary power has nothing to do but to ascertain facts, and direct the execution of the law in the particular cases which warrant it. But when the fact is ascertained, and the question is, whether it comes within the purview of a law which does not apply to it in terms, or whether, although it is embraced by the letter of the law, it shall be excluded from its operation—the decision is surely a legislative act, because it must either extend the words so as to embrace the case, or restrict them so as to exclude it. But the extending a statute or restricting it is as clearly a legislative act as the passing of the statute was; a particular legislative act as respects the case under consideration; a general one, by the doctrine of precedent, as respects all others. Yet this duty has devolved upon the judiciary, even in countries where the division of the several departments is a fundamental principle; so much so, that the abuse has become the rule; and it is as

commonly said to be the duty of the judge to supply the law, and that it is his duty to apply it.

To avoid any apprehension, let it be once understood that it is no part of the system to judge without authority resulting from the reasons which determine the construction of the context of the law, the introduction of a new given to the word employed in the statute, or the introduction to the subject matter well understood covering the true nature of the act. The operation must of necessity be performed. It is directed by the text of the code, and indeed is so unconsciously performed in the common intercourse of life (*to*) that it cannot be called on interpretation. That which is *restrained* from, and forbidden by the code, is not the application of the rules of grammar and common sense to discover from the language of the law what it intend, but the encroachment on the legislative functions begun, when judges talk of distinctions between the letter and the spirit of the law, and forget the limits of their authority, so far as to supply omissions and retrench superfluities in statutes. I know that the inaccurate language of many statutes, has, in several cases, reduced the judge to a kind of necessity of exceeding his constitutional powers, because the legislator has neglected his, and thus furnished a plausible excuse for this encroachment, and I acknowledge, that for the most part, it has been beneficially, or at least, not oppressively exercised. But it is not the less an encroachment. In England it is part of the common law that judges should exercise this power. But that part of the common law which regulates the distribution of fundamental powers, is the constitution; therefore the

(a) Instances of this are scarcely necessary. "John fell upon Peter and bruised him severely." If the context shows that they were travelling together in a carriage which was overturned, we shall have one sense of this phrase; if it informs us that they were quarrelling, we shall have another. The instantaneous operation of the mind in connecting the phrase used with the preceding matter can scarcely be called an interpretation, though the words themselves may convey very different

exercise of this power, is there a constitutional right. In the state of Louisiana, on the contrary, it is no part of our constitution—it is expressly forbidden by that instrument. If the act of declaring to be law, and enforcing as such, something which the legislature has not prescribed, or declaring that what they have prescribed shall not have the force of law, under whatever pretexts such acts be done, be the exercise of legislative powers ; then is the act of enlarging or restraining the words of a statute, by a constructive reference to its spirit, expressly forbidden by our constitution, which directs, both in affirmative and negative terms, not only that the three great departments shall be kept separate, but that no person invested with one of these powers shall exercise the functions of either of the others. What, then, is *our* remedy for the evil of ambiguous laws ? The judges cannot, as in England, supply it. The legislature must eradicate the mischief, instead of suffering it to be tampered with by the quackery of judicial legislation. Laws must be brought back to their original simplicity. They must be expressed in purer terms when the language affords them, and when no others can be found but such as admit of a double sense, they must be explained by a periphrasis, elucidated by examples. The exceptions intended must be stated, the true deductions made, and such false conclusions as are apprehended, expressly negatived. This is what has been attempted to be done by the feature in the code now under consideration. If the attempt has been only partially successful, it cannot, it is believed, be doubted that the law will be better understood by this course ; because it is precisely in this way that the advocates for the jurisprudence of decrees contend that the law is better elucidated by the court—every precedent is but an example—every decision it contains is a deduction from the text of the law, declaring affirmatively what is, or negatively what is not, its intent ; and those who say that this task can be well performed, long after the law has been made, by judges who had no agency in making it, cannot deny that it may be better done at the time of

[illegible]

exempting particular subjects from general enactments ; and in a great measure supersedes the class of statutes, whose titles *an act to explain, an act entitled, an act to amend, an act in addition to, an act to repeal, an act, &c.*, were a puzzle, and the references of which, from one statute to another, were as difficult to trace as the most involved table of descents.

The Introductory Reports to the several Codes of crimes and punishments, of procedure, of evidence, and of reform and prison discipline, which compose this system, will be found to contain a notice of the changes in our present law, on those subjects respectively which are proposed, and the reasons at large for introducing them. They will be longer and more argumentative, as this has been, than would have been necessary, if, still a member of your honourable body, I could meet objections as they are raised, and make the corrections which your superior wisdom would suggest. Having offered nothing without reflection, I have reasons for all I have proposed. Many of them, probably, will be found insufficient to support my conclusions, but those conclusions are honestly if not wisely drawn, and the system which they support is submitted in the full confidence that it will receive a fair, a full, and a deliberate consideration. Fair, without prejudice against the reporter for the opinions he may entertain on other subjects, or against his doctrines for their novelty ; full, after a consideration of the whole system, and the bearing of its different parts on each other ; deliberate, without rejecting any one provision, until the reasons for proposing it have been maturely weighed, and its probable effects calculated. A decision thus made must be wise, and will doubtless prove satisfactory to your constituents, and honourable to your country and yourselves.

INTRODUCTORY REPORT

TO THE

CODE OF CRIMES AND PUNISHMENTS.

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AFTER noticing and accounting for some variations in the arrangement of the work from the original plan, and giving a slight reference to some of its leading principles, it is proposed in this report to review the CODE OF CRIMES AND PUNISHMENTS, examine the principal changes it purports to make, and offer the reasons on which they are founded.

By the Report on the Plan of a Penal Code (a) made in 1822, it was proposed to comprise the whole system of penal law in one code, giving a separate book to each of the four divisions—crimes and punishments, procedure, evidence, and reform and prison discipline, and to appropriate another to the definition of the technical terms used in the body of the work. It was, however, soon discovered that, by this arrangement, the subdivisions of titles, chapters, sections, and articles, would not be sufficiently numerous for preserving order in the distribution of each of the several great divisions; by throwing them into distinct codes, an additional great division was gained, and an easier mode of reference procured. Each of those great divisions, therefore, in the system now presented, forms a separate code, and the book of definitions is a kind of appendix to all, and preserves the form originally given to it.

(a) Report on the Plan of a Penal Code, p. 2.

in approving the general doctrines on which you have directed your code to be prepared ; although, as might be expected they differ in the conclusions that may be drawn from them, and refer their authority to different sources. Thus, while all agree that the true end of penal jurisprudence is to prevent crimes, and that the doctrine of vindictive law is in the highest degree absurd and unjust, some insist that crimes are to be repressed only by the example of punishments ; others, that reformation is the only lawful object. Some refer the right to punish to an implied contract between society and its members ; others, to the principle of utility alone, and there are those again who admit of no other standard than abstract justice. Each of these has its partisans in the conflict. Without entering into the abstract reasoning to which they lead, we may content ourselves with this important result. that whether the right to punish be founded on contract, or utility, or justice ; whether the object be to punish or reform ; whatever be the true doctrine on either of these subjects, we have the satisfaction to know that, by a singular felicity, if either theory be right, the practical results we have drawn from our reasoning cannot be wrong, for all the provisions of our system coincide with abstract justice, with general utility, and with the terms of any supposable original contract ; and whether reformation or punishment be the true means of preventing crimes, our plan of prison discipline will effect the end, for it embraces both.

If upon a critical examination of the system proposed to you, it should be found to have this extraordinary adaptation to principles that have been considered as discordant, it will certainly go far to prove that the theoretic disputes have turned more upon terms than on any real difference between them. For instance, if the supposed social contract ever existed, the foundation of it must have been the preservation of the natural rights of its members. And this makes it, in all its effects, the same as the theory which adopts abstract justice as the basis of the right to punish ; which, properly defined,

is only that which secures to every one his right: and if utility, the remaining source to which this power is referred, be found to be so closely united with justice, as in penal jurisprudence to be inseparable, it will follow that any system founded on one of these principles, must be supported by the other.

In the same manner, as to the means for attaining the object common to all, the prevention of crime, if the most efficacious punishment is that which also best produces reform, then the several theories are reconciled in practice, however they may differ in the arguments they use.

It has therefore been thought more proper to abstain from entering the lists of controversy with either of the disputants, and to adopt, implicitly, the tenets of neither school; but to be content with uniting, if we can, the suffrage of all in the practical results we shall establish. There is, however, one of these results, which, although deducible from the first principles established by all, is not yet generally admitted in practice; that feature which so honourably distinguishes from the existing laws of any other nation the plan your predecessors unanimously approved, and which has been one exciting cause of the attention which the European world is now giving to the subject; you may easily imagine that I mean *the abolition of the punishment of death*. Seldom has any doctrine made such rapid strides as this has in public opinion. Although opposed by inveterate prejudices, long habits, mistaken religious opinions, and the general indefinite fear of innovation; yet its proselytes are becoming every day more numerous; the example of our state is everywhere quoted; the future measures of its legislation are expected with the greatest interest; and the final abolition of a punishment, repugnant to our natures, is expected from you with confidence, not unmixed with anxiety, by the whole civilized world. An enlightened citizen of Geneva (a) has published proposals for a prize essay on

(a) Mr. Sellon, member of the sovereign representative council of Geneva, as early as 1818, proposed to the Council to abolish the punishment of death; and in 1836 he offered the prize referred to in the text.

the subject, in which the arguments for the abolition which have been approved by this state are copied as a text. A society in Paris has followed the example. The several periodical papers of France, England, Germany, and Holland are filled with disquisitions for the most part highly approving of the plan of abolition ; but none, as far as I have perceived, even of those who doubt its success, discouraging the experiment as a dangerous one.

If this principle is retained in our code, it dates back to the vote of approval, and secures to us a name among nations to which our relative population or strength would not, for ages, have entitled us ; a distinction more honourable than any that wealth or power or advancement in any other science could give—and I need not observe to the enlightened body I address, how much of that distinction possessed by a country is reflected back

In his proposals, after citing the opinions of Beccaria and Bentham, he adds—"I finish these observations by producing a document the most recent and the most conclusive in favour of my proposition. It is the accession of the general assembly of Louisiana to the principles laid down by Mr. Livingston in his report. My fellow citizens will there see a republic adopting dispositions, of which the principal one is, *the absolute suppression of the punishment of death.*" He then gives a copy of our law of 1820, the certificate of my appointment, all that part of the report relating to the punishment of death, and the resolution approving of the report. In a note on the law, he says,—“Having no other object in this writing than to convince my fellow citizens that the abolition of the punishment of death would be a measure both useful and honourable for my country, I have thought that this end could not be better attained than by making them acquainted with the report of Mr. Livingston, made to the general assembly of Louisiana. Louisiana is a republic. It is a component part of an illustrious union, as we form part of the Swiss confederation ; and the constitution of the United States, as well as our federal act, permits the members to provide for themselves the best laws, even when they differ from those of the other states. We owe to Mr. Taillandier the translation of this report,” &c. And he concludes his programme by citing the examples of modern nations, in which this abolition has been carried into effect. 1. Russia, under Elizabeth. 2. Tuscany, under Leopold. 3. “*Louisiana*, in America, which, on the report of Mr. Livingston, by a solemn resolution of the sovereign assembly, has decreed the absolute suppression of this punishment. This report, in which it will be seen that the author has collected

scarcely possible to imagine, and certainly impossible to trace, any other state than that of the social—it is found wherever men are found, and must have existed as soon as the number of the species were sufficiently multiplied to produce it. Man, then, being created for society, the Creator of man must have intended that it should be preserved; and as he acts by general laws, not by special interference (except in the cases which religion directs to believe), all primitive society, as well as the individuals of which it is composed, must have been endowed with certain natural rights and correspondent duties, anterior in time and paramount in authority to any that may be formed by mutual consent. The first of these rights, perhaps the only one that will not admit of dispute, is, as well on the part of the individual as of the society, the right to continue the existence given by God to man, and by the nature of man, to the social state in which he was formed to live: and the correspondent mutual duty of the individual and of the society is to defend this right; but when the right is given, the means to enforce it must, in natural as well as positive law, be admitted to be also given. If, then, both individuals and the society have the right to preserve their several existence, and are, moreover, under the reciprocal duty to defend it when attacked, it follows that, if one or the other is threatened with destruction, which cannot be averted but by taking the life of the assailant, the right, nay more, the duty to take it exists. the irresistible impulse of nature indicates the right she has conferred, and her first great law shows that life may be taken in self-defence. It is true the aggressor has the same right to exist; but if this right were sacred while he was attempting to destroy that of another, there would be co-existing two equal and conflicting rights, which is a contradiction in terms. The right, therefore, I speak of, is proved; but both in the individual and in society it is strictly defensive—it can only be exerted during that period when the danger lasts, by which I mean when the question is, which of the two shall exist, the aggressor or the party

attached whether it be a right or a duty. Before this can be decided, it is necessary to ask if it is no longer solidly established that the right of every man to life would be completely destroyed if we were to demand of every man to obey the law of non-resistance.

Therefore, the question whether it is a right or a duty to be proved. That the right is established is not true, but that it must be in defence of one of the two duties, and extreme (p), and that it is a duty of the man who has no other alternative remain to prevent the threatened destruction.

In order to judge whether there is any necessity for calling this abstract right into action, we must recollect the duty imposed upon society of protecting its members, derived, if we have argued correctly, from the social nature of man, independent of any implied contract. While we can imagine society to be in a bad and imperfect state as to render the performance of this duty impossible without taking the life of the aggressor, we must concede the right. But is there any such state of society? Certainly none in the civilized world, and our laws are made for civilized man. Imprisonment is an obvious and effectual alternative; therefore, in civilized society, in the usual course of events, we can never suppose it necessary, and of course never lawful; and even among the most savage hordes, where the means of detention might be supposed wanting, banishment, for the most part, would take away the necessity of inflicting death. An active imagination, indeed, might create cases and situations in which the necessity might possibly exist—but if there are any such, and they are sufficiently probable to justify an exception in the law, they should be stated as such, and they would then confirm the rule; but by a perversity of reasoning in those who advocate this species of punishment, they put the exception in the

(a) This explains the part of the report on the Plan of a Penal Code which relates to the comparison between the evil of the offence and the punishment.

place of the rule, and what is worse, an exception of which the possibility is doubtful.

It may be observed, that I have taken the preservation of life as the only case in which even necessity could give the right to take life, and that for the simple reason, that this is the only case in which the two natural rights of equal importance can be balanced ; and in which the scale must preponderate in favour of him who defends against him who endeavours to destroy. The only true foundation for the right of inflicting death is the preservation of existence. This gift of our Creator seems, by the universal desire to preserve it which he has infused into every part of his animal creation, to be intended as the only one which he did not intend to place at our disposal. But, it may be said, what becomes of our other rights ? Are personal liberty, personal inviolability and private property to be held at the will of any strong invader ? How are these to be defended, if you restrain the right to take life to the single case of defence against an attack upon existence ? To this it is answered : Society being a natural state, those who compose it have collectively natural rights. The first is that of preserving its existence ; but this can only be done by preserving that of the individuals which compose it. It has, then, duties as well as rights ; but these are wisely ordered to be inseparable. Society cannot exert its right of self-preservation without, by the same act, performing its duty in the preservation of its members. Whenever any of those things which are the objects of the association, life, liberty or property, are assailed, the force of the whole social body must be exerted for its preservation ; and this collective force, in the case of an individual attack, must, in ordinary cases, be sufficient to repel it without the sacrifice of life ; but in extraordinary cases, when the force of the assailants is so great as to induce them to persevere in a manner that reduces the struggle to one for existence, then the law of self-defence applies.

But there may be a period in which individual rights may be injured before the associated power can interfere.

In these cases, the nature of society does not deprive the individual of his right, but only requires that then preservation be made good by payment of property against the value of the person, or of the property with which he is assailed. The right of society is from the right to property, to whatever comes within its sphere, and from that of personal inviolability, which is independent on restrictions imposed by nature on the exercise of a natural right. As the injury then is not in any way a detriment of compensation, the individual is under no necessity to prevent the aggression; and if that used by the aggressor endangers his life (a), the question then becomes one of self defence, and the same reasoning applies which was used to show the right of taking life in that case. But where the individual attacked is either by his own physical force, or by the aid of the society to which he belongs, defend himself or his property, when the attack is not of such a nature as to jeopardize his own existence in the defence of them, if he take the life of the aggressor, under these circumstances, he takes it without necessity, and consequently without right. This is the extent to which the natural law of self defence allows an individual to go in putting another to death. May any association of individuals inflict it for any other cause, and under any other circumstances? Society has the right only to defend that which the individuals who compose it have a right to defend, or to defend itself—that is to say, its own existence, and to destroy any individual, or any other society which shall attempt its destruction. But this, as in the case of individuals, must be only while the attempt is making, and when there is no other means to defeat it. And it is in that sense only that I understand the word so often used, so often abused, so little understood, *necessity*. It exists between nations during war; or a nation and one of its

(a) The existence of danger alone, is not a sufficient justification by the English, nor I believe by other laws for homicide, it must be a ~~danger~~ danger from which there is no other means of escape.

component parts in a rebellion or insurrection ; between individuals during the moment of an attempt against life, which cannot otherwise be repelled , but between society and individuals, organized as the former now is, with all the means of repression and self-defence at its command, never. I come, then, to the conclusion, in which I desire most explicitly to be understood that, although the right to punish with death might be abstractedly conceded to exist in certain societies, and under certain circumstances, which might make it necessary ; yet, composed as society now is, these circumstances cannot reasonably be even supposed to occur—that therefore no necessity, and, of course, no right to inflict death as a punishment does exist.

There is also great force in the reasonings which have been used to rebut that, which founds the right to take life for crimes on an original contract, made by individuals on the first formation of society. First, that no such contract is proved, or can well be imagined. Secondly, that if it were, it would be limited to the case of defence. The parties to such contract could only give to the society those rights which they individually had ; their only right over the life of another is to defend their own ; they can give that to society, and they can give no more. In this case also, therefore, the right resolves itself into that of doing what is necessary for preservation. The great inquiry then recurs—is the punishment of death in any civilized society necessary for the preservation either of the lives of its citizens individually or of their social collective rights ? If it be not necessary, I hope it has been proved not to be just ; and if neither just nor necessary, can it be expedient ? To be necessary, it must be shown that the lives of the citizens and the existence of society cannot be preserved without it. But can this be maintained in the face of so many proofs ? Egypt, for twenty years, during the reign of Sabaco (*a*)—Rome, for two hundred and

(*a*) Diod. Siculus.

one government had abandoned, and the other had not yet established its authority, there was not, I believe, a single instance of murder, or of any attempt to destroy the order of society : so that one argument or the other must be given up. Either the Spanish laws existed, or we ourselves furnish a proof that a nation may exist, in peace, without the punishment of death. Societies have, then, existed without it. In those societies, therefore, it was not necessary. Is there anything in the state of ours that makes it so ? It has not, as far as I have observed, been even suggested. But if not absolutely necessary, have its advocates even the poor pretext that it is convenient ; that the crimes for which it is reserved diminish under its operation in a greater proportion than those which incur a different punishment ? The reverse is the melancholy truth. Murder, and those attempts to murder, which are capitally punished, have increased in some of the United States to a degree that not only creates general alarm, but, by the atrocity with which they are perpetrated, fix a stain on the national character which it will be extremely difficult to efface. I might rely for this fact on the general impression which every member of the body I address must have on this subject ; but as the result is capable of being demonstrated by figures, I pray their attention to the tables annexed to this report, in which, although they are far from being as complete as could be wished, they will see an increase of those crimes that demonstrates, if anything can do it, the inefficiency of the means adopted and so strangely persisted in, of repressing them. The small number of executions compared with the well authenticated instances of the crime, shows that the severity of the punishment increases the chance of acquittal ; and the idle curiosity which draws so many thousands to witness the exhibition of human suffering at the executions ; the levity with which the spectacle is beheld, demonstrates its demoralizing and heart-hardening effects ; while the crimes committed at the very moment of the example intended to deter from the commission, shows

how entirely inefficient it is. One instance of this is so remarkable that I cannot omit its detail. In the year 1822 a person named John Leechler was executed at Lancaster, in Pennsylvania, for an atrocious murder. The execution was, as usual, witnessed by an immense multitude; and of the salutary effect it had on their feelings and morals, we may judge from the following extract from a newspaper printed in the neighbourhood (*a*). The material facts, which are stated in it, having been since confirmed to me by unquestionable authority:—

"It has long," says the judicious editor, "been a controverted point, whether public executions, by the parade with which they are conducted, do not operate on the vicious part of the community more as incitements to, than examples deterring from, crime. What has taken place in Lancaster would lead one to believe, that the spectacle of a public execution produces less reformation than criminal propensity. While an old offence was atoned for, more than a dozen new ones were committed, and some of a capital grade. *Twenty-eight persons* were committed to jail on Friday night for divers offences at Lancaster, such as *murder, larceny, assault and battery, &c.*, besides many gentlemen lost their pocket-books, where the pick-pockets escaped, or the jail would have overflowed.

"In the evening, as one Thomas Burns, who was employed as a weaver in the factory near Lancaster, was going home, he was met by one Wilson, with whom he had some previous misunderstanding, when Wilson drew a knife and gave him divers stabs in sundry places, which are considered mortal. Wilson was apprehended and committed to jail, and had the same irons put on him which had scarcely been laid off long enough by Leechler to get cold."

A letter, in answer to some inquiries I made on the subject, adds to this information, that Wilson was one

of the crowd who left his residence expressly to witness the execution : and to take away all doubt that the Gazette account was not exaggerated, that he has since been convicted of the murder.

I pray the advocates for this punishment to reflect on this example, to recollect that, detailed in my former report, of the sale of forged notes in the chamber where lay the corpse (a) of him who was that day executed for a similar offence. I ask them seriously to ponder on them, on the numerous other instances of a like nature that must occur to them, and then to say whether they can believe the punishment of death an efficient one for murder. The most serious and intense reflection has brought my mind to the conclusion, not only that it fails in any repressive effect, but that it promotes the crime. The cause it is not very easy to discover, and still more difficult to explain ; but I argue from effects—and when I see them general in their occurrence after the same event, I must believe that event to be the efficient cause which produces them, although I may not be able to trace exactly their connection. This difficulty is particularly felt in deducing moral effects from physical causes, or arguing from the operation of moral causes on human actions. The reciprocal operations of the mind and body must always be a mystery to us, although we are daily witnesses of their effects. In nothing is this more apparent, or the cause more deeply hidden, than in that propensity which is produced on the mind to imitate that

(a) The following circumstance, which I find stated by a gentleman at a public meeting in Southampton, in England, as having been detailed by Mr. Buxton, is a stronger case :—

"An Irishman, found guilty of issuing forged bank notes, was executed, and his body delivered to his family. While his widow was lamenting over the corpse, a young man came to her to purchase some forged notes. As soon as she knew his business, forgetting at once both her grief and the cause of it, she raised up the dead body of her husband, and pulled from under it a parcel of the very paper for the circulation of which he had forfeited his life. At that moment an alarm was given of the approach of the police ; and not knowing where else to conceal the notes, she thrust them into the mouth of the corpse, and there the officers found them."

to pursue the most dangerous trades, to undertake the most desperate enterprises, for the most trifling considerations. While there is a chance of escape, the happy disposition of our nature makes us always believe it will be favourable to us. We seize the certain enjoyment that is offered by glory, by profit, or even by convenience, and we trust that we shall escape the uncertain danger. If this is acknowledged in the common pursuits of life, why should it be denied in the rarer instance of crime? The great error of our laws is, an obstinate refusal to consider an offender against them as moved by the same impulses, guided by the same motives, with the rest of the community; refusing, in short, to consider him as a man. They suppose him a demon or an idiot, and their provisions are, accordingly, for the most part calculated for a being actuated by perversity too incorrigible to be amended, or by folly incapable of pursuing his own happiness when the path is pointed out. If we, on the contrary, were to frame our laws for man as he is, should we consider that the threat of death would be an efficient restraint to him who, before he commits the crime, takes every measure that prudence can dictate to avoid discovery, and who, after that, calculates on the proverbial uncertainty of the law; while many of us are not deterred by a risk which we cannot flatter ourselves to avoid, for a trifling gain or a momentary gratification. Yet it may be said the good citizen incurs the risk of death, but not of death in such a form; he would not, for the gratification or reward you speak of, incur the slightest risk of infamy, although the greatest that can be presented of honourable death does not affright him. This is most true, and this is most conclusive in the argument. It is not death, then, that is feared; it is death with ignominy.

Bertram is the *beau idéal* of a pirate; but the same contempt of death is found, in a less degree, perhaps, to animate other freebooters—witness the cool reply of one of them to a fellow-sufferer on the wheel:—"Why do you make all this noise; (said he), did you not know that in our profession we were subject to one malady more than the rest of the world?"

poisoned cup? We are accordingly told, expressly, that these laws were abolished, not by a formal decree, but by the tacit and unrecorded consent of the Athenians (a). I make no quotations from modern writers on penal law to this point, for there is not one who has not given his testimony in favour of the position I have taken; and yet, by a most singular incongruity, each of them has a favourite crime to which he thinks it inapplicable.

This is not an essay to prove the inutility, the danger, and, if these are admitted, the *crime* of employing the punishment of death. Such a work would require a methodical arrangement, and a research into the first principles of penal law, which cannot be expected from a mere explanatory report, in which heads of argument are suggested without much order and with little development, leaving to the enlightened minds to which they are addressed the task of pursuing, to all their consequences, the topics which are raised for consideration. With this understanding, I shall add a few more reflections on this subject, so interesting to our best feelings.

All nations, even those the best organized, are subject to political disorders, during which the violent passions that are excited avail themselves of every pretext for their indulgence; and parties, animated with the rage of civil discord, mutually charge each other with the worst intentions and blackest crimes; but even in the hottest warfare of party rage, the destruction of a rival faction or a dangerous leader is seldom attempted but by the imputation of some crime; new laws are not made on such occasions, but the existing laws are perverted and misapplied; new punishments are not invented, but those already known are rigorously enforced against the innocent. This is the usual state of things in all intestine commotions, and even after they have assumed

(a) *Draconis leges, quoniam videbantur impendio acerbiores, non decreto jussuque, sed facito illiteratoque Atheniensium consensu, obliterate sunt.*—*Aulus Gellius*, l. 3, c. 18.

the shape of civil war, accompanied by all its horrors, those who do not fall in the field are subjected to something like a trial before their lives are sacrificed. Murder, on those occasions, arrays itself in the spotless ermine of justice, covers itself with her robes, mounts her sacred seat, borrows her holy language, adopts her forms, calls its iniquitous sentence the judgment of the law; and even when it stretches forth its bloody hand for execution, it wields her own weapon, and inflicts on the innocent victim no other punishment than that which previous laws had provided for guilt.

This is necessary, is inevitable, in cases of civil discord. Whatever may be the projects of unprincipled leaders, the people who compose their party and their strength must be made to believe that those to whom they adhere are the friends and supporters of the laws, and therefore no violent open disregard of established forms would be tolerated, even where the essentials of justice are violated; forms speak to the senses, the substance of justice to the understanding only—this last may be perverted by the passions or imposed on by falsehood in fact, or sophistry in argument; but the eyes and ears only are necessary to observe a violation of form. In the times I have supposed—and they may afflict our country as they have all others—it is of importance to sanction no penalty that may be used to the destruction of your best citizens; they are the most obnoxious to all parties; not partaking the violence of either, they are suspected by both, and become the first victims; and never has any revolutionary or factious storm desolated any land, without the loss of men lamented even by their mad executioners, after the calm of peace had restored them to their senses. Beware, then, how you sharpen the axe, and prepare the other instruments of death, for the hand of party violence. Beware how you so accustom the people to their use, that whenever their judgment may be led astray so as to think the innocent guilty, they may feel no shock in witnessing the last agonies of a man whom they may afterwards deplore as a national loss, and whose death

they may feel as a national disgrace. I dwell upon this, because I deeply feel its force.

History presents to us the magic glass on which, by looking at past, we may discern future events. It is folly not to read ; it is perversity not to follow its lessons. If the hemlock had not been brewed for felons in Athens, would the fatal cup have been drained by Socrates ? If the people had not been familiarized to scenes of judicial homicide, would France or England have been disgraced by the useless murder of Louis or of Charles ? If the punishment of death had not been sanctioned by the ordinary laws of those kingdoms, would the one have been deluged with the blood of innocence, of worth, of patriotism, and science, in her revolution ? Would the best and noblest lives of the other have been lost on the scaffold, in her civil broils ? Would her lovely and calumniated queen, the virtuous Malshernes, the learned Condorcet—would religion, personified in the pious ministers of the altar—courage and honour, in the host of high minded nobles—and science, in its worthy representative Lavoisier—would the daily hecatomb of loyalty and worth—would all have been immolated by the stroke of the guillotine ; or Russel and Sidney, and the long succession of victims of party and tyranny, by the axe ? The fires of Smithfield would not have blazed ; nor, after the lapse of ages, should we yet shudder at the name of St. Bartholomew, if the ordinary ecclesiastical law had not usurped the attributes of divine vengeance, and by the sacrilegious and absurd doctrine, that offences against the deity were to be punished with death, given a pretext to these atrocities. Nor, in the awful and mysterious scene on Mount Calvary, would that agony have been inflicted, if by the daily sight of the cross, as an instrument of justice, the Jews had not been prepared to make it one of their sacrilegious rage. But there is no end of the examples which crowd upon the memory, to show the length to which the exercise of this power, by the law, has carried the dreadful abuse of it, under the semblance of justice. Every nation has wept over the graves of

patriots, heroes and martyrs, sacrificed by its own fury. Every age has had its annals of blood.

But not to resort to the danger of the examples in times of trouble and dissension, advert once more to that which was formerly urged, and to which I must again hereafter return—that which attends its regular practice in peace—the irremediable nature of this punishment, when error, popular prejudice, or false or mistaken testimony, has caused its infliction to be ordered upon the innocent; a case by no means of so rare occurrence as may be imagined. It is not intended to enter into a detail of those which I have myself collected; they are not few, although they must necessarily bear a small proportion to those which were not within my reach. The author of a book of high (*a*) authority on evidence, has brought together several cases which are well authenticated. In France, in the short space of one year, I have gathered from the public papers that seven cases occurred, in which persons condemned to death by the primary courts and assizes, have been acquitted by the sentence of a superior tribunal on a reversal of the sentence (*b*). In other states of our union these cases are not uncommon. With us the organization of our courts prevents the correction of any error, either in law, or in fact, by a superior tribunal. But every where it is matter of surprise that any cases should be discovered of these fatal mistakes. The unfortunate subjects of them are, for the most part, friendless; generally their lives must have been vicious, or suspicion would not have fastened on them; and men of good character sometimes think it disreputable to show an interest for such men, or to examine critically into the circumstances of their case. They are deserted by their connexions, if they have any; friends

(*a*) Phillips on Evidence, Appendix.

(*b*) Is not this a striking lesson to teach us the necessity of providing the means of correcting error in criminal as well as in civil cases—of preserving life and liberty as well as property? The importance of the subject may perhaps excite my referring once more to the bill formerly introduced in the general assembly by the reporter.

they have none. They are condemned—executed—forgotten; and in a few days, it would seem, that the same earth which covered their bodies has buried all remembrance of them, and all doubts of their innocence or guilt. It is, then, not unreasonable to suppose, that many more such cases have existed than those that have fortuitously been brought to light (*a*). Would you retain a punishment that, in the common course of events, must be irremediably inflicted, at times, on the innocent, even if it secured the punishment of the guilty? But that is far from being the effect. While you cannot, in particular cases, avoid its falling upon innocence, that very cause,

(*a*) Let me give the substance of this objection to capital punishment in the words of a man to whom the science of legislation owes the great attention that is now paid to its true principles, and to whom statues would be raised if the benefactors of mankind were as much honoured as the oppressors of nations:—"The same objection," he says, "lies against all afflictive penalties, that they cannot be remedied, but they may be compensated. For death alone there is no resource. There is no man, ever so little versed in criminal procedure, who does not feel a kind of terror, when he thinks on how slight a circumstance the life of a man under accusation for a capital crime, depends, and who does not recollect instances in which individuals have owed their lives to some extraordinary circumstance, accidentally brought to light at the critical moment of danger. The chances of danger are, without doubt, very different, according to the different systems of procedure . . . but are there any judiciary forms, which can guard, in perfect security, against the snares of falsehood and the illusions of error? No! absolute security is a point of perfection which may be approached much nearer than has yet been done without reaching it; for witnesses may deceive, or be deceived; the number of those who testify to the same fact is not an infallible safeguard; and as to proofs which are drawn from circumstantial facts—circumstances the most conclusive, in appearance—those which it would seem impossible to explain, but on the supposition of guilt—even these may be the effect of chance, or of preconcerted circumstances, arranged by interested persons. The only proof which would appear to bring complete conviction, the free confession of the accused, besides its being very rare, does not always give absolute certainty—since men have been found, as in the case of witchcraft, to confess themselves guilty of a crime that it was impossible to commit. Those are not imaginary alarms, drawn from simple possibilities; there are no criminal records that do not present examples of these fatal mistakes—and those which, by a concurrence of singular events, have become known, give us reason

from the imperfection of all testimony, will make it more favourable to the escape of the guilty: and the maxim, so often quoted on this occasion (*a*), will no longer be perverted in order to effect a compromise between the conscience of the juror and the severity of the law, when your punishments are such only as admit of remission when they have been found to be unjustly imposed.

Other arguments, not less forcible, other authorities equally respectable, might be adduced to show the ill effects of this species of punishment: but the many topics that are still before me in this report, oblige me to pursue this one no further than to inquire what good can be expected, or what present advantage is derived, from retaining this punishment? Our legislation surrendered it without a struggle, in all cases, at first, but murder, attempt to murder, rape, and servile insurrection; and afterwards extended it to a species of aggravated burglary (*b*). Now, as these cases are those only in which it has been deemed expedient to retain this punishment,

to suspect many innocent victims unknown. It may even be observed, that the cases in which the word evidence is most frequently used, are those in which the testimony is most doubtful. When the alleged crime is one of those which excites the most antipathy, or brightens the spirit of party, the witnesses unconsciously become accusers; they are no more than the echoes of public clamour; the fermentation increases by its own action, and it is no longer permitted to doubt. It was a frenzy of this kind which first seized the people, and was afterwards communicated to the judges in the unfortunate affair of Calas."—*Theory of Rewards and Punishments, Bentham*.

(*a*) That it is better ten guilty should escape than one innocent suffer, is invariably given to the jury as a maxim in all capital cases, depending on circumstantial evidence; and where there are no irritating causes, it invariably succeeds.

(*b*) Act of 20th March 1818, sec. 3. Breaking into a dwelling-house in the night time, with intent to steal, &c. so far this crime was already punishable under the act of 1805. The severe punishment of death is added, if any person was lawfully within the house, and if the offender was armed with a dangerous weapon; or if not so armed, if he armed himself in the house, or made an assault on the person then being in the house lawfully. If the occupier of the house was not there lawfully, the offender escapes death! What a circumstance on which to hang the life of a man. If the tenant has a good lease, the robber is hanged; if he is

as it has been abandoned in all others, the serious inquiry presents itself, why it was retained in these, or why abandoned in the others? Its inefficiency, or some of the other objections to it, must have been apparent in all the other numerous offences in which it has been dispensed with, or it would certainly have been retained or restored. Taking this acknowledged inefficiency, in the numerous cases, for the basis of the argument, let us inquire whether there is anything which makes it peculiarly adapted to the enumerated crimes, which it is unjust or inexpedient to apply to any of the others? We have three modes of discovering the truth on this subject: by reasoning from the general effects of particular motives on human actions; by analogy, or judging from the effects in one case to the probable effects in another; or by experience of the effect on the particular case. The general reasoning upon the justice and efficacy of the punishment will not be repeated here, but it is referred to as being conclusive as to all offences, and admitting of no exception that would apply to murder, or either of the three other cases in which our laws inflict it. If we reason from analogy, we should say the only argument ever used in favour of death as a punishment is, that the awful example it presents will deter from the commission of the offence; but by your abandonment of it in all cases but these, you acknowledge it has no efficacy there. Analogy, therefore, would lead us to the conclusion that, if it was useless in the many cases, it would be so in the few. But it is acknowledged that no analogy, or any other mode of reasoning, no theory, however plausible, ought to influence when contradicted by experience. You have tried this remedy, and found it ineffectual!

an intruder, he escapes death. Again, if the robber meets nobody in the house and steals ten thousand dollars, he only suffers imprisonment; but if he sees a servant, and shakes his fist at him, he is hanged, although he should steal nothing. If he breaks in without weapons, and rifles the house of all its contents, he is imprisoned only; if he finds a fowling-piece, and carries it off in his hand, he is hanged. Another specimen of the laws which nothing but presumption could attempt to amend.

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years' experience (during which there was not a single conviction, and as far as is known, not a single indictment under the law which denounced imprisonment as the penalty) ought to have convinced us, that the severe punishment was not necessary, while the two convictions which so soon succeeded the promulgation of that law, are strong testimony that the punishment of death is not an effectual remedy for the evil. As to rape, that its rare occurrence is much more properly to be attributed to the manners of the age than to any fear of the punishment annexed; for if that were the efficient cause, we should certainly find it at least as powerful in the case of murder, a crime to which the offender is not stimulated as in the former case, by the strongest sensual appetite.

Besides, this is not the strong hold of those who argue in favour of capital punishment. Driven from every other ground, they defend it as peculiarly applicable to the case of murder. The slow abandonment of it for other offences, is a proof of the gradual advance of true principles, and the pertinacity with which it is adhered to in this, shows the force of early impressions and inveterate prejudice, even in the most enlightened minds yet that prejudice must in time yield to the evidence offered by the practical results which have attended this infliction—results which show, almost to demonstration, that the public exhibition of homicide, directed by the sacred voice of the law, so far from repressing, does but encourage it, in private quarrels. It is commonly advocated on the principle of vindictive justice (*a*), and can be, with a due

(*a*) I had once a conversation with an exalted magistrate, a man of high attainments and great liberality, on the abolition of this punishment. He acceded to the propriety of the measure, in all cases but murder; because of the difficulty of keeping the offender, and the severity of solitary confinement, which was proposed to be substituted. But when these two objections were, as I thought, satisfactorily answered, he replied by one of the exclamations used in the text, and added, very frankly—"I must confess that there is some little feeling of *revenge* at the bottom of my opinion on this subject." If all other reasoners were equally candid, there would be less difficulty in establishing true doctrines.

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

$\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$

...and ...

11. The following table shows the number of people who attended the concert in each age group.

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$\frac{1}{2} \left(\frac{1}{2} + \frac{1}{2} \right) = \frac{1}{2}$

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[illegible]

would be expected to be a

encouraged it by the numbers

But however this will be, it

in the warmth of conversation.

in any serious argument, the other is not a

What then is ϕ ? Part (a) is a hint.

proportioned to the same, that $h = \frac{1}{2} \times 100 = 50$ ft.

of all offences, death, the greatest of all punishment,

ought to be applied to it. But when a rule is so

applied? To apportion the punishment to the cell net,

does not mean to make the subject of the

quantity of evil which he inflicted by his crime, that

would be both impossible and unjust. It means, that

the punishment should be such as to do it from the com-

mission of the crime, but no greater. If, then, death has

not this effect, why ought it to be applied? But that is

has not this effect, is shown by reasoning and by facts.

Why then will you continue to apply it? Pressed by

this inquiry, we have the same eternal answer - murder

deserves death. Out of this circle no reasoning can drive

them. Sometimes, indeed, we are asked, are you sure

that if we give up this punishment, your substitute will

on 7/10/11 ...

prove effectual ? If you mean so effectual as to eradicate the crime, I answer, No ! But I am as sure as experience and analogy, and reasoning united, can make me, that it will be more effectual. What is it we fear ? Why do we hesitate ! You know, you cannot deny, that the fear of the gallows does not restrain from murder. We have seen a deliberate murder committed in the very crowd assembled to enjoy the spectacle of a murderer's death ; and do we still talk of its force as an example ? In defiance of your menaced punishment, homicide stalks abroad and raises its bloody hand at noon-day in your crowded streets ; and when arrested in its career, takes shelter under the example of your laws, and is protected by their very severity, from punishment. Try the efficacy of milder punishments ; they have succeeded. Your own statutes, all those of every state in the union, prove that they have succeeded, in other offences ; try the great experiment on this also. Be consistent ; restore capital punishments in other crimes, or abolish it in this. Do not fear that the murderers from all quarters of the earth, seduced by the mildness of your penal code, will choose this as the theatre of their exploits. On this point we have a most persuasive example. In Tuscany, as we have seen, neither murder nor any other crime was punished with death, for more than twenty years, during which time we have not only the official declaration of the sovereign, that "all crimes had diminished, and those of an atrocious nature had become extremely rare," but the authority of the venerable Franklin, for these conclusive facts ; that in Tuscany, where murder was not punished with death, only five had been committed in twenty years ; while in Rome, where that punishment is inflicted with great pomp and parade, *sixty murders* were committed in the short space of three months, in the city and its vicinity (a). "It is remarkable," he adds to this

(a) If ever any philosophy deserved the epithets of useful and practical, it was that of Dr. Franklin. His opinions must have weight, not only from his character, but from the simple, intelligible reasoning by which they are supported. What says this venerable and irreproachable

account, "that the manners, principles, and religion of the inhabitants of Tuscany, and of Rome, are exactly the same. The abolition of death alone is a punishment for murder, produced this difference in the moral character of the two nations." From this it would appear, rather that the murderers of Tuscany were attracted by the severe punishments in the neighbouring territories of Rome, than that those of Rome were attracted into Tuscany by their abolition. We have nothing to apprehend, then, from this measure : and if any ill effects should follow the experiment, it is but too easy to return to the system of extermination.

witness in the case of humanity, which we are now pleading. I suspect the attachment to death, as a punishment for murder, in minds otherwise enlightened upon the subject of capital punishments, arises from a false interpretation of a passage in the old testament, and that is—'He that sheds the blood of man, by man shall his blood be shed.' This has been supposed to imply, that blood could only be expiated by blood. But I am disposed to believe, with a late commentator on this text* of scripture, that it is rather a prediction than a law. The language of it is simply, that such is the folly and depravity of man, that murder, in every age, shall beget murder. Laws, therefore, which inflict death for murder, are, in my opinion, as unchristian as those which justify or tolerate revenge ; for the obligations of Christianity upon individuals, to promote repentance, to forgive injuries, and to discharge the duties of universal benevolence, are equally binding upon states.

* The power over human life is the sole prerogative of him who gave it. Human laws, therefore, are in rebellion against this prerogative, when they transfer it to human hands.

"If society can be secured from violence by confining the murderer, so as to prevent a repetition of his crime, the end of extirpation will be

* "I hope I shall not offend any one by taking the liberty to put my own construction on this celebrated passage, and to inquire, why it should be deemed a precept at all? To me, I must confess, it appears to contain nothing more than a declaration of what will generally happen : and in this view to stand exactly upon the same ground with such passages as the following—'He that leadeth into captivity, shall go into captivity'—'He that taketh up the sword, shall fall by the sword.' The form of expression is precisely the same in both texts. Why then may they not all be interpreted in the same manner, and considered, not as commands, but as denunciations? and if so, the magistrate will no more be bound by the text in Genesis, to punish murder with death, than he will by the text in the Revelations, to sell every Guinea captain to our West India planters."—Rev. W. Turner.

One argument, the ferocious character impressed on the people by this punishment, which was insisted on in the first report, has been so strongly illustrated by a subsequent event in Pennsylvania, that I cannot omit stating it. After the execution of Lechler had gratified the people about York and Lancaster with the spectacle of his death, and had produced its proper complement of

answered. In confinement he may be reformed; and if this should prove impracticable, he may be restrained for a term of years that will probably be co-eval with his life.

"There was a time when the punishment of captives with death or servitude, and the indiscriminate destruction of peaceable husbandmen, women, and children, were thought to be essential to the success of war, and the safety of states. But experience has taught us that this is not the case; and in proportion as humanity has triumphed over these maxims of false policy, wars have been less frequent and terrible, and nations have enjoyed longer intervals of internal tranquillity. The virtues are all parts of a circle. Whatever is humane, is wise; whatever is wise, is just; and whatever is wise, just, and humane, will be found to be the true interest of states, whether criminals or foreign enemies are the subject of their legislation.

"For the honour of humanity it can be said, that in every age and country, there have been found persons in whom uncorrupted nature has triumphed over custom and law. Else, why do we hear of houses being abandoned near to places of public execution? Why do we see doors and windows shut the days and hours of criminal executions? Why do we hear of aid being secretly afforded to criminals to mitigate or elude the severity of their punishments? Why is the public executioner of the law a subject of such general detestation? These things are latent struggles of reason, or rather, the secret voice of God himself, speaking in the human heart, against the folly and cruelty of public punishments.

"I shall conclude this inquiry by observing, that the same false religion and philosophy which once kindled the fire on the altar of persecution, now dooms the criminal to public ignominy and death. In proportion as the principles of philosophy and Christianity are understood, they will agree in extinguishing the one and destroying the other. If these principles continue to extend their influence upon government, as they have done for some time past, I cannot help entertaining a hope, that the time is not very distant, when the gallows, the pillory, the stocks, the whipping-post, and the wheel-barrow (the usual engines of public punishment), will be connected with the history of the rack and the stake, as marks of the barbarity of ages and countries, and as melancholy proofs of the feeble operation of reason and religion on the human mind."—*Inquiry upon Public Punishments.*

prevail, a penal, on circumstances totally out of the power of the lawgiver or the judge to foresee or control; but by the indulgence of either feeling, every good end of punishment is totally defeated.

I cannot I ought not, to dismiss this subject without once more pressing on the most serious consideration of the legislature an argument which every new view of it convinces me is important, and, if we listen to the voice of conscience, conclusive: the irremediable nature of this punishment. Until men acquire new faculties, and are enabled to decide upon innocence or guilt without the aid of fallible and corruptible human evidence, so long will the risk be incurred of condemning the innocent. Were the consequence felt as deeply as it ought to be, would there be an advocate for that punishment, which, applied in such case, has all the consequences of the most atrocious murder to the innocent sufferers—worse than the worst murderer! He stabs, or strikes, or poisons, and the victim dies—he dies unconscious of the blow—without being made a spectacle to satisfy ferocious curiosity, and without the torture of leaving his dearest friends doubtful of his innocence, or seeing them abandon him under the conviction of his guilt; he dies, and his death is like one of those inevitable chances to which all mortals are subject, his family are distressed, but not dishonoured, his death is lamented by his friends, and, if his life deserved it, honoured by his country. But the death inflicted by the laws, the murder of the innocent under its holy forms, has no such mitigating circumstances. Slow in its approach, uncertain in its stroke, its victim feels not only the sickness of the heart that arises from the alternation of hope and fear, until his doom is pronounced, but when that becomes inevitable, alone, the tenant of a dungeon during every moment that the cruel lenity of the law prolongs his life, he is made to feel all those anticipations, worse than a thousand deaths. The consciousness of innocence, that which is our support under other miseries, is here converted into a source of bitter anguish,

because I have witnessed more than one condemnation under false constructions of law, or perjured, or mistaken testimony ; sentences that would now have been reversed if the unfortunate sufferers were within the reach of mercy. I have seen, in the gloom and silence of the dungeon, the deep concentrated expression of indignation which contended with grief ; have heard the earnest asseverations of innocence, made in tones which no art could imitate ; and listened with awe to the dreadful adjuration, poured forth by one of these victims with an energy and solemnity that seemed superhuman, summoning his false accuser and his mistaken judge to meet him before the throne of God. Such an appeal to the high tribunal which never errs, and before which he who made it was in a few hours to appear, was calculated to create a belief of his innocence ; that belief was changed into certainty, the perjury of the witness was discovered, and he fled from the infamy that awaited him ; but it was too late for any other effect than to add one more example to the many that preceded it of the danger, and I may add impiety, of using this attribute of the divine power, without the infallibility that can alone properly direct it. And this objection alone, did none of the other cogent reasons against capital punishment exist, this alone would make me hail the decree for its abolition as an event, so honourable to my country and so consoling to humanity, as to be cheaply purchased by the labour of a life.

I cannot quit this part of the subject without submitting to the general assembly the opinion of one whose authority would justify an experiment even more hazardous than this, but whose arguments are as convincing as his name is respectable. They are not the opinions of one whom the cant which is used to cover the ignorance of the day would call a theorist, but of a man whose whole life was spent in the useful and honourable functions of the highest magistracy, whose name is always mentioned with reverence, and whose doctrines are quoted as authority, wherever the true principles of

ought to be retained. He who preserved the life of a Roman citizen was entitled to a more honourable recompense than the daring soldier who ventured his own by first mounting the breach. The civic was preferred to the mural crown. The Romans, during the best period of their history, reduced this abolition to practice. "Far," said their great orator, endeavouring in a corrupted age to restore the ancient feeling on the subject, "far (*a*) from us be the punishment of death—its ministers—its instruments. Remove them, not only from their actual operation on our bodies, but banish them from our eyes, our ears, our thoughts; for, not only the execution, but the apprehension, the existence, the very mention of these things is disgraceful to a freeman and a Roman citizen." Yet the Romans were not very remarkable for a pusillanimous fear of death. In the age of which I speak, they did not want the excitement of capital punishment to induce them to die for their country. On the contrary, it might, perhaps, be plausibly argued, that the servile disposition, which disgraced the latter ages of the republic, was in some measure caused by the change, which made the sacrifice of life the expiation for crime, instead of the consummation and proof of patriotic devotion.

Conscious of having been guilty of much repetition, and certain that I have weakened, by my version of them, arguments much better used by others, I am yet fearful of having omitted many things that might have an effect in convincing any one of those to whom this report is addressed. The firm religious belief I have of the truth of the doctrine I advance, contrasted with the sense of my incapacity to enforce it upon others, must have produced obscurity where the interests of humanity require there should be light, and confusion where the performance of my great duty demands order. But the

(*a*) Carnifex et abductio capitis, et nomen ipsum crucis absit, non modo a corpore civium Romanorum sed etiam a cogitatione, oculis aurbus—harum etiam omnium rerum non solum eventus atque perceptio, sed etiam conditio, expectatio, mentio ipsa denique, indigna civis Romano, atque homine libero est.—*Cicero pro Rabirio*.

truth will appear in spite of these obstacles. From the midst of the cloud, with which human imperfection has surrounded her, her voice, like that of the Almighty from the mount, will be heard reiterating to nations as well as to individuals, the great command, "THOU SHALT NOT KILL."

Having, more fully than was intended, but much more imperfectly than the subject demands, reviewed the great characteristic that distinguishes the code, the *total abolition of capital punishment*, it will be necessary to advert (which will, hereafter, be very briefly done) to other penalties, which, for reasons nearly as cogent, have been also abrogated. As to the nature of the punishments, by which these are proposed to be replaced, the principal one, imprisonment in its various grades, is fully discussed in the Code of Prison Discipline. Fines are retained, but with modifications that lessen the force of the objections usually made to that punishment. It is certain, that indiscriminately applied to the poor and the rich, this is one of the most unequal punishments that can well be imagined; and that the wide range of discretion which the apportionment of it must necessarily require to be vested in the judge, is another strong objection; but when that discretion is properly exercised, no penalty can be so easily proportioned to the offence and to the circumstances of the offender; it is divisible in the most perfect degree, and admits of complete compensation whenever it has been improperly enforced. But yet it was foreseen that cases would occur, in which the wealth of the offender might make the highest range of a discretionary fine a penalty too light to be felt; and in which his poverty might change the lowest into utter ruin. To avoid as much as possible these inconveniences, the fine, in most cases, is accompanied by a discretion to commute it into simple imprisonment, which may be inflicted on those whose circumstances would enable them to despise a fine; and on the other hand, to avoid the oppression and ruin of the poor, it is provided that no fine shall ever exceed one-fourth of the clear property of the delinquent; and still

further to secure the indigent from ruin, and at the same time to provide for his punishment; where there is no property, the fine is to be commuted into imprisonment, calculating one day for every two dollars (a) of the fine, limiting it, however, so that whatever may be the amount of the fine, imprisonment shall not exceed ninety days. Fines are also rendered more equal, when inflicted for a breach of official duty, by apportioning them to the amount of official emolument. There are also general rules, intended to impress on the mind of the judge the principles by which he ought to be guided, in the exercise of the discretion vested in him by the law. These will be found in the Code of Procedure, and the reasons for those directions in the Introductory Report to that Code.

The collection of fines is regulated by the same rules which govern executions in civil cases; giving to the state no preference over other creditors, but from the time of registering the order imposing the fine.

Considering fine as a personal punishment, the death of the offender operates as a discharge at any time before it is paid. Any other arrangement would make it operate as a partial forfeiture upon his heirs.

Forfeiture and suspension of certain civil and political rights are also punishments inflicted by the code. They are applied chiefly to misdemeanours in office, and to such offences as show the want of the proper qualities to perform the duties which are required by them. These are sparingly inflicted, because, if too frequent, it would create a body of men in the community discontented with their situation and ready to promote any violent change.

Among the civil rights, however, which are forfeitable, is not found that of testifying. The reasons of making this change, are set forth at some length in the Introductory Report to the Code of Evidence. Here it will be sufficient to remark, that such a disqualification would

(a) This valuation of a day's imprisonment may seem high, but a just regard for personal liberty induced a belief that double the standard of daily wages would not be deemed excessive.

several offences, one or two of the general and peculiar features of the code must be adverted to. The first is, the enunciation of the general principles on which it is founded. In the first arrangement of the work, this idea occurred as one of the highest utility: and although it was perfectly unprecedented, I was not deterred from the execution by its novelty. The advantages are recited in the chapter itself, and need scarcely any elucidation (*a*). If it be conceded, that the people ought to know, not only what their agents have done, but their reasons for doing it; that any work, and particularly that of legislation, will be better done when the object is clearly defined, and the means and rules for attaining it have been attentively considered; that uniformity is necessary, and that it will be better preserved by having a record of the grounds upon which former laws were made;—if any of these things be conceded, then is that part of the code a valuable improvement, provided it contains the true principles of penal legislation—such as cannot change, and which, if good now, will remain so for ever. These, once observed, once acknowledged to be the rule, every future law will be measured by their standard. Then, no more discordant provisions; no more vacillating legislation; no more accumulation of statutes upon the same matter; none of those evils, in short, which are contrary to these principles. They will perform the office of a constitutional rule, not, indeed, avoiding those laws which are made contrary to it, but preventing their very existence. I rely more on the importance and utility of this part of the work, because it is that which, both in its form and substance, has received the most decided approbation of all those who, both in Europe and America, have made it the subject of examination or criticism.

An introductory notice contains the explanation of certain provisions intended, chiefly, to avoid circumlocution and repetition, in the course of the work. The disgusting tautology of the English statutes, from which our own

(*a*) Preamble to the Penal Code.

are not entirely free, is by this means avoided. The strictness with which their judges adhered, at times, to the letter of the statute, induced the necessity of ringing all the changes which manner, gender, and time required, to bring within the words of the statute, every possible case which they could govern, and the inconvenience has been so much felt, that a bill has lately passed, containing, in substance, *en* the same enactments for avoiding it, that are contained in the third chapter of the code I now present.

One article of this chapter relates to another feature in the system that is entirely new, but it is thought a very important improvement. I mean the definition of all the technical words or phrases used in the work. The utility of this must be acknowledged by those whose objection to the introduction of the new code is, that it will unsettle

(a) The following extract from Mr. Peel's speech, introductory to this bill, will show, that this part of the plan has been deemed worthy of adoption, in Great Britain:—"I certainly have set the example to the house of drawing up such bills for the future, in an intelligible manner. Not being myself a lawyer, and possessing, of course, no technical knowledge, I do confess, sir, that there is no task which I contemplate with so much distaste, as the reading through an ordinary act of parliament. In the first place, the long recapitulations, the tedious references, the constant repetitions, the providing or designating offences as punishments for the specific case of men, women and children, and for every degree and relation in society, and the necessity of indicating these several personages and matters by as many appropriate relations and designations—then the confusion resulting from the attempt to describe, and constantly referring to many different descriptions of property. Really, sir, all these various repetitions, recapitulations, and references are so tedious and so perplexing, that I, for one, almost invariably find myself completely puzzled before I get to the end of a single clause. The mode I have adopted in this bill to obviate all this confusion and uncertainty, does seem to me, I speak it with submission, much more eligible and precise than the usual phraseology, adopted in these acts, and might, I cannot help thinking, be pursued with advantage in bills which may be brought in hereafter. I will give you an example. It is enacted in my bill, that if any person be convicted of entering into and stealing in any house, room, &c. he shall be liable to a certain penalty; and in the conclusion of the act, that there may be no doubt arising from want of specification of sex or the identity of the offence, there is a clause to this effect:—'And in order to remove all doubt as to the meaning and

the signification that has been affixed, by judicial decisions, to words most commonly used in statutes. Now if this certainty be, as it unquestionably is, an advantage of the first consequence ; then its benefit must be in proportion to the degree of certainty which is given ; but judicial decisions cannot, from their nature, give this certainty in as great a degree as positive law ; the book of definitions, therefore, will be positive law, and in order to know the sense in which any word is used in the code, it will be only necessary to turn to its definition, instead of poring over a countless number of volumes, and endeavouring, from their incomplete or contradictory statements, to find the sense in which it has, at times, been employed in different cases. But it must be observed, that although the endeavour has been to preserve as much as possible the same words that are used in common parlance, to express the same ideas, yet, whenever there was any uncertainty, the signification has been fixed according to the sense in which the expression is used in the code ; and that philological science has always been sacrificed to certainty and precision. The Book of Definitions, therefore, must not be consulted as a dictionary of the language of the country, but of that of the Code, whenever the uncertainty of the former created the necessity of declaring in what sense the term is employed.

I will not attempt to conceal from the general assembly, the extreme difficulty of this part of my labour ; more than any other, it exercised my closest and intensest

intention of certain words in this act, be it hereby further enacted, that whenever the words person, party, offender, and so forth occur, 'they shall each and all of them be deemed to intend and demonstrate any number of persons or parties, and of any sex, being the offender or offenders under this act.' If any person, therefore, commit an offence contemplated by that act, he will, under the general description, be liable to the penalty affixed to such offence. My bill, therefore, will include every person, male, or female, and of every rank or condition of offending under its enactments. Owing to the various lights in which I have considered this provision and the extent which I have thus given to the bill, I am afraid it will be impossible to frame one more comprehensive."

attention, and I think it has not been exercised in vain. I think so, not only from the satisfaction of my own mind, but from the approbation of men who have had the kindness to employ high intellect, enforced by official duty, to the task of close thinking on legal subjects, in trying to detect the errors of that part of the work, and who have given me leave to say, that they have found none. These venerable names, with the opinions they have given, will be found in the appendix. But whatever weight is due to this authority, I disavow any design of sheltering myself or any thing I have done, behind it. It is the duty of the general assembly to judge for themselves, and for the people to whom they are accountable. To their judgment I submit. Another advantage of this feature in the system is this; that however imperfect it may be at present, the law for giving effect to the code contains enactments for its amendment and progression towards that improvement, which all your penal laws, by this arrangement, must gradually acquire.

The other articles of this chapter need no comment.

We come now to the Code itself. The first chapter of the first book contains General Provisions. Most of them are in exact conformity with what is generally supposed to be the present laws, but so expressed as to leave no room for doubt or cavil; some of them, however, deserve particular notice. The evil already pointed out, attending the passage of successive penal laws on the same subject, without repealing the first, is one so likely to recur, that some general rules were thought necessary to regulate the effect of such legislation. Reasoning from what ought to be, rather than from what is, it might be supposed that when a new penalty was created without repealing a former law that had, also, imposed one, the legislature intended to preserve both, and such has hitherto been the construction; but, in fact, it is the very reverse; the new penalty is, nine times in ten, intended as a substitute, and the old law is suffered to stand merely through haste or negligence. An article provides for this, and declares

that in such case, unless the contrary is expressed, the former penalty shall be abrogated.

A more important disposition is that which declares that there shall be but one mode of construing penal laws, according to the plain import of the words they employ, and expressly abolishes what are called favourable and strict constructions; in other words, permitting the court sometimes to say that the law means more, sometimes less, than the legislature intended. Common sense acknowledges but the one mode, when the language is clear and explicit. When the law is ambiguous, another article provides the remedy. Such a law, if it purport to impose a penalty, is void; and he who is accused of contravening it, must be acquitted. In the fear, however, that such general terms may sometimes be used as may include an act which the legislature could not have intended to forbid, an article has been added since the code was printed, specially providing, that in such cases, the defendant must be acquitted, and the case reported to the legislature; who may then more explicitly declare their will to govern future cases. A perusal of the statute against concealed weapons, will exemplify the necessity of this provision. There, a *knife* is expressly called a weapon, and the "wearing it in the coat, or any place about the wearer, so that it do not appear in full view," makes him liable to a penalty, and subjects him to search; wearing a penknife in a man's waistcoat pocket is an offence within the plain meaning of the words of the statute, employed in their usual sense; and yet it evidently could not be the intent of the legislature to make this an offence. Other cases of the like kind may occur, and the law should provide against inaccuracy, as well as grosser faults.

Another article expressly forbids all convictions for constructive offences; that is, offences that are created by courts, and not by the legislature. The latter alone are the proper organ for declaring what acts or omissions shall be punished, and the text forbids the judiciary, for reasons which it assigns, from interfering in their func-

tions. Whether our courts have extended any offences, by construction, is not known, nor can it be until some means are taken to report and publish their decisions in criminal cases; but it is certain that they adopt the constructive larcenies and forgeries of the English law (2), and there is every reason to suppose that the same causes will produce the same effects. Those which we have seen in another country, where the state of society and manners are similar to our own, we may expect here. It will not be denied that England has suffered the most cruel evils by this exercise of judicial power. The restriction, then, in the text was necessary. We may, hereafter, have a judge who may exercise his constructive ingenuity upon murders or burglary, or other offences, as Jeffries did upon treasons. Wise laws must look beyond the present day; and it is their office to foresee and counteract the effects of propensities which tend to disturb or corrupt the order of society.

The second chapter of this book contains provisions which, relating solely to prosecutions and trials, are enlarged on in the text of the code of procedure, and will be elucidated in the introductory report to that code. One only of these will be mentioned here, that relating to the trial by jury, and this only for the purpose of referring to what has been said on that subject in the first report, to which I need add nothing, and from which all my subsequent reflections have suggested nothing to retrench.

The third chapter contains the general provisions which relate to persons amenable to the penal laws. Most of them have no novelty to call for any explanation—some, however, do. Citizens and inhabitants of the state may be punished, as well for acts done out of the state as

(2) If one lends a horse to another, who rides away with him, Blackstone declares it is no larceny in 1779; and in 1786, by a construction never before heard of, it was declared to be a larceny. Forgery was originally confined to making the deed of another. It has been since extended to a very different offence, making a deed in the true name, the offender representing himself to be another person.

for them within ; but in the former case, only when it is so expressly declared. The state has an undoubted right to forbid and punish any acts done out of its jurisdiction, which are calculated to produce an injury to its government or the rights of its citizens. On this principle the government of the United States made it penal (a) for any citizen of the United States, although residing abroad, to carry on any correspondence with a foreign government, for the purpose of influencing its measures with respect to the United States ; and also, under a high penalty, forbids any citizen, without its limits, from fitting out any vessel to cruise on a power with whom (b) they are at peace. The general assembly will find this principle acted upon in that part of the code which relates to fraudulent insurances.

Children below nine years of age, cannot, as formerly, be convicted of any crime ; nor between that and fifteen, unless on proof of sufficient understanding to know the nature of an offence. The crimes of children of that age are those of their parents or adult associates ; and whatever may be the apparent depravity of an infant below that age, the true correction is education and restraint. These are fully provided for by the Code of Prison Discipline ; and the subject of juvenile criminality is so fully discussed in the Introductory Report to that code, that it is omitted here.

Offences committed by married women, under the influence or by the command of their husbands, and by minors under the like control of any one to whom he owes obedience, or by whom he may be supposed to be influenced, present strong cases of extenuation on the one part, and aggravation on the other, which, in this chapter, are provided for by a correspondent increase and diminution of punishment : this is new, but its justice must be so apparent as to need no comment.

(a) Act for punishing certain crimes therein specified, 30th January 1799.

(b) Act of 20th April 1818, sect. 4.

respect are provided under the proper head ; and that there are other limitations reducing the penalty when the intent was to commit a misdemeanour only. Yet with all this, I am bound to say, that although I think these articles can practically produce no injustice, yet I wish I could have put them in such a shape as to avoid an apparent conflict with principle. They soften, however, the rigour of the present law, which punishes all homicide as murder, although there was no intent to kill or even to injure, if it is done in the attempt to commit a felony

The attempt to commit an offence, which fails from some circumstance not dependent on the will of the offender, is also made punishable, because every attempt, although it fail of success, must create alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment, but as the injury is not, in the case before us, as great as if the act had been consummated, only half the punishment is awarded.

The fifth chapter relates to a repetition of offences, and the increased punishment which it directs to be inflicted on those who are not deterred by one punishment from the commission of other crimes, seems so necessary and reasonable, that it may pass without observation.

The sixth requires more consideration. It contains general rules respecting principals, accomplices, and accessories, making some material changes ; to the introduction of which, however, I have heard of no objection. Its first operation is by defining distinctly who shall be principals and accomplices, to avoid the continual repetition considered to be necessary now in all our penal statutes, such as this in the laws against forgery—"Whoever shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly aid or assist in the forging or counterfeiting," &c. One general provision, applicable to all cases, will render in future, the use of all these words unnecessary. The persons described by them are principal offenders or accomplices ; they both incur the same punishment, because the guilt is the same,

and they cause the same injury ; but the offences are distinguished, and it is thought that the line between them is so accurately marked that no mistake of consequence can occur. They are distinguished, because, although the guilt, the injury and the punishment are the same, yet the act is different, and it is of great consequence, in penal law, not to confound in one denomination acts of a different nature. To counsel the commission of a crime, is certainly a very different act, requiring different evidence from that of actually committing it.

The law and the denomination is also somewhat altered, and it seems to me not without necessity. Our law, as it now stands, has two species of accessories ; one "before the fact," the other "after the fact," but having so little resemblance either in their definition, in their guilt, or in any other circumstance, that it was deemed expedient to dissolve the connexion, and place accessories before the fact in the class of accomplices, a denomination which implies closer connexion with the guilt of the principal offender than the accessory, who, as the name implies, can only become criminal *after* the offence has been counselled by the accomplice and executed by the principal. This last offence consists in aiding the offender to escape from justice,—a fault that may have many palliating circumstances, originating in the best feelings of our nature. That of the accomplice can have none. Therefore the punishment is very different ; and as those feelings are strongest in certain close connexions, formed as well by society as nature, and which should not be broken without evident necessity by the laws, it is further provided, that certain near connexions, who may follow up this impulse of nature by aiding another in his endeavours to avoid the pain or disgrace of punishment, should not incur this penalty.

In affixing punishments, we should compare the evil of the offence with that necessarily caused by the punishment, and decide as the balance shall incline. In this case the evil of the offence is now and then the escape of an offender ; a rare event, and not of much moment,

because, by his escape from the punishment ordained by the laws, he inflicts on himself that of banishment, which answers two good ends: it deters almost as effectually as the regular punishment, it rids you of the offender, and prevents a repetition of his offence; and it fails only in the chance of reformation which a good system might promise, but which, under your present laws, could not be hoped for. If the punishment is incurred, its evil is the conflict between human laws, and in cases of near ties of blood, those which God has implanted in our hearts, in which the former will never prevail, but will be despised for their inefficacy, or abhorred if they are carried into execution. The same observation that was made to show the propriety and convenience of establishing a general rule applying to accomplices in all offences, applies also to accessories. By the present laws, as has been already observed, accessories after the fact, in burglary, are subjected to a much heavier penalty than those in murder; and owing to the application of the term to two distinct offences, it is doubtful whether a different and greater punishment is not also designated in cases of larceny; for the term used in the law, which directs whipping as the punishment for accessories in that offence, does not distinguish whether those before or after the fact are intended.

The whole of this first book, of which I have just finished the very hasty review, is new. In no other code that I have seen, has the legislator entered into a full and frank explanation with the people; told them what he intended to do, and for what reason; marked out the limits of the right course, and bade them observe whether he exceeded them. In no other has he treated them, in short, like reasonable beings, and told them to reflect as well as obey. The whole of this book was presented with the first report, published by your predecessors with the stamp of their unanimous approbation, and has been received, both in Europe and the United States, with the most favourable judgment of the profession.

The subject of the second book of this code is offences

and punishments, and its first title treats of their general nature and divisions. Its purpose is chiefly that of order and arrangement, an object of more consequence than the confused legislation that has generally prevailed would lead us to suppose. Irregularity is not only an evil in itself, by the loss of time and the errors which it necessarily occasions, but it leads to greater evils; to an ignorance of the laws, because, if any difficulty is created in finding them, it is not very frequently overcome. The slightest obstacle is sufficient to make us give up the search for that which does not, and which we flatter ourselves will not, immediately concern us; and there is no obstacle more discouraging than the want of arrangement. That which is proposed is simple. The great divisions are few, and their subdivisions grow naturally out of them. An offence is first defined to be an act or omission which is forbidden by a positive law, under the sanction of a penalty. The terms of this definition exclude all offences against unwritten law, all offences growing out of a construction of any law, all contravention of any law which has not provided a penalty for its breach. But it is not enough to know, generally, what are offences. They must, from their nature, be different in degree, and affect different objects. These two considerations call for two general divisions. By the first, which marks the degree of offences, they are divided into *CRIMES* and *MISDEMEANORS*; the former designating those which may be punished by imprisonment in the Penitentiary, or by a forfeiture of any civil or political right; the latter, all other offences. These terms have been retained rather than adopted. In the English law they have generally an analogous, although somewhat indefinite, signification. "Crime, properly speaking," according to the language of Blackstone (*a*), "being used to denote such offences as are of a deeper dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of misdemeanors." While the terms were retained, it was

(*a*) Black. Com. 3.

necessary that a precise idea should be affixed to them. Where is the line to be drawn between offences of a deeper dye and those of less consequence? How deep the dye must be to give to an offence the colour of a crime, or how little the consequence which is to sink its importance into a misdemeanor, the learned commentator does not inform us. Perjury is an offence of deeper dye than an assault; yet, according to Christian (a), they are both misdemeanors. Larceny is an offence of less consequence than murder; yet they are both crimes. The code gives a precise rule, drawn from the nature of the punishment; one that produces no violent change in the usual meaning of the words, but gives them that precision which is necessary in every term employed in a law.

The character drawn from the object against which the offence is directed, gives us the second general division into public and private offences. Here it is impossible that the line of demarcation should be very distinct. Offences which chiefly injure society at large, and come under the first denomination, can rarely be committed without also affecting private rights; nor, in general, can any injury be offered to an individual that does not directly, or in a remote degree, affect the well-being of the community. But it ought to be distinctly understood, that this division is entirely for the sake of order and arrangement in framing the code, and that no mistake in arranging a particular offence, under one or the other of those heads, can be productive of the least injury. No act can be prosecuted as a public or private offence; the terms are unknown in the procedure, they do not affect the form or the substance, and are merely labels affixed to each offence, that they may be arranged in the proper place, and each offence is defined without any relation to its arrangement under one or the other of these denominations. The same observation applies to the different subdivisions; they give names to the different

(a) Note to Blackstone, p. 5.

titles under which the particular offences are found, but no one can any more be indicted for an offence against the sovereign power of the state, calling it by that name only, than he could for a public offence by that designation; the particular act forbidden by the law must be designated, because that alone constitutes the offence. To prevent any error, all this is concisely expressed in the text of the code.

The second chapter of this book has the nature and general divisions of punishments for its object. Much of what may be thought necessary comment on this, has been anticipated in the preceding discussion on the infliction of death, and for a still greater portion, we must refer to the introductory report on the Code of Prison Discipline.

Here, it will be proper to remark on the general features of the scale of punishments that are provided for different offences.

There is an evident distinction in the nature of offences, which demands a correspondent one in punishments. Some show an habitual depravity, which requires long discipline to amend; others are the effect of an occasional disregard of the rights of others, which may be corrected by the privation, pain, or disrepute of the punishment, the remembrance of which may prevent repetition, and the example deter from imitation. On this distinction rests the system of punishments—Penitentiary imprisonment being designated for all offences of the first description, and the other penalties for the others. Of these last, simple imprisonment in close custody is one which is the most frequently employed, because it is applicable to offences which, although they do not evince the degree of depravity which characterises those punishable in the penitentiary, yet require not only correction but restraint. In these cases solitude is administered long enough to give time for reflection, and to operate as a punishment, but is not prolonged, as in penitentiary confinement, to the period which is there necessary to destroy vicious habits and acquire those of honest industry. It is the connecting link between simple imprisonment, in which

nothing but a temporary and slight correction is thought necessary, and the strong remedy of solitude and labour.

Liberty being the best enjoyment of a citizen, its privation, in different degrees, was thought the fittest punishment for faults which disturb social order, by which only it can be preserved, and the good citizen will value the greatest of all blessings the more, when he sees that its enjoyment is inseparably attached to an observance of the laws, and its loss generally the consequence of their breach.

But to some, the privation of personal liberty would be a severer punishment than to others, for the same offence, and for some infractions it would be too great for the offence. Recourse in these cases must, therefore, be had to property, the next great source of human happiness, and its curtailment by fines, forms another grade in the scale of penalties. The principles which have been applied to adapt them to different offences have been already explained. It need only be added here, that in some designated cases the necessary discretion of adopting one or the other, or both, of these punishments, simple imprisonment and fine, is vested in the judge, within certain limits. Because, in all those cases there must be a correction for the offence; and the judge only can determine, from the circumstances of the party, whether the forfeiture of property would operate as such correction, or whether a temporary privation of liberty ought not to be substituted or added.

It has been wisely ordered, that liberty and property, although the principal sources of our enjoyment, should lose the greatest part of their value, if not attended with personal consideration, or the good opinion of those with whom we are associated, and the equal enjoyment of all those rights to which they are entitled. This social feeling gives to the legislator another hold upon the citizen in order to force an observance of the laws, by threatening for their breach a privation of those rights,

and of the confidence and consideration by which alone they can be obtained. This forms the third and only remaining class of punishments--privation of office, of civil, of political rights, either for a time or perpetually.

This is all the penal machinery that is employed in the code either for punishment, repression, example, reformation, or prevention. The infliction of bodily pain by mutilation or stripes, indelible stigmas, exposure in the pillory, the stocks, or by public labour, are banished from the code for reasons that are conclusive, and which have once been presented to the legislature and received their approbation. All of them are at war with every principle on which this system is founded; and if either is retained, no good result can be expected from the adoption of it. But there is a reason drawn from our state of society so conclusive against the last, that it cannot be resorted to without danger of the most serious kind. There is a line of demarcation, which it would be rash in the extreme to destroy even in punishments; and the sight of a freeman performing the forced labour, or suffering under the stripes usually inflicted on the slave, must give rise to ideas of the most insubordinate nature. A false economy only could suggest the repetition of an experiment which has every where failed, every where produced increase of misery, degradation and crime; and here might be the cause of evils worse than all these combined.

This part of the plan has, in a very flattering notice taken of it in England, been considered as defective, because it does not combine satisfaction to the party injured by the offence, with the punishment inflicted by public justice.

This idea has been a favourite one with many criminalists. It has been embodied in the French, and some other codes, and once found a place in our laws. But, however plausible the reasons for its adoption may appear, neither the principle on which the system was

founded, nor the experience of its effects, would permit me to recommend it.

The distinction between penal and civil laws appears to me to be this, that the first, from their very nature, exclude the idea of private compensation, whereas it is the sole object of the other in all cases of injury; if it were not so, public justice would depend on the vindictive or interested passions for its execution, or might be defeated by the apathy of the individual; and if the old system of pecuniary satisfaction for crimes were not renewed by the laws, it would be by stipulations between the parties. This has been so well acknowledged, that, in most laws, it has been made criminal for the injured party to interfere between the society and the offender against its laws; and after a prosecution has begun, it is only in cases of small importance that the system of compromise is allowed to act.

The foundation of all penal law then is, that the society has received an injury by the breach of its rules. All violations of right are not brought within their purview; those which are not, remain to be compensated by the civil law. Over these it has an exclusive jurisdiction; and although offences for breaches of penal law generally are accompanied by, or consist of, a private injury, yet the rights acquired to the society, and to the individual, by this breach, are totally distinct. The last can only seek for compensation, the first for something else, which may be, according to circumstances, either less or more. In case of theft, the owner has a right to ask for restoration or compensation. The society has a right to inflict punishment independent of that restoration. So far has this been carried by the common law, that by one of its extraordinary fictions, the private right is *merged*, as they call it, in the felony, and the individual loses the right to his property, as soon as it can be proved that it was stolen from him; that is to say, when that is proven, which shows conclusively that he has a title to it. This distinction existing, then, in their very nature, between

civil and penal law, the question is, whether it is better to combine the two operations, so as by the same suit to give satisfaction and inflict punishment? This is a question of mere convenience; and it is to be answered, better perhaps, by experience than by reasoning. If it is to be effected so as to preclude the party from his civil suit, he must be represented in the prosecution. This, in theory, would disturb the order of proceeding, and by confounding the two jurisdictions, cause confusion in our ideas of the nature of public justice, when we saw it so much identified with private interest. It must necessarily produce some irregularity. The wish or the interest of the public prosecutor might be to bring on the trial when the private party was not ready to show the extent of his loss, and there would be either delay or injustice. It would lessen the dignity of the tribunals of public justice, by making them the arena in which contests were carried on for mere private rights. The attorney for the party in the civil side must necessarily take a part in the conduct of the cause; and the course he thought best might differ from that preferred by the public prosecutor. This collision must produce disputes, and disputes between those concerned in the administration of justice ought to be avoided. By not suffering the person injured to be made a party, these inconveniences indeed may be avoided; but then you commit the greater injustice of deciding on his interests without hearing him. These conclusions appear to me to be confirmed by experience on both modes of procedure. In France the person injured may make himself a party; but as far as a foreigner can judge from the reports of the cases, most of the inconveniences, which might be anticipated, have seemed to follow. And in our state, where the damages were directed to be inquired (a) of by the jury that tried the cause, merely on the prayer of the party, it was found so incon-

(a) Act of 1805, section 89.

venient in practice that the law was soon afterwards repealed.

For these reasons it has been thought most consonant to principle, as well as most convenient in practice, to carry on the prosecution entirely unconnected with the private suit ; but, in all cases, to permit the party injured to sue for his damages, and whenever a claim for a fine and those damages come in collision, to give a preference to the private claim.

The discussion of the nature and effects of different punishments has been necessarily irregular. Its anticipation could not be avoided in some degree, when we considered the great characteristic of the code—the abolition of the penalty of death ; and a very great part is, under an equal necessity, postponed, to be treated of in the Introductory Report to the Code of Prison Discipline.

I now proceed to the consideration of the important titles which define the different offences, and assign to each its appropriate punishment.

The first class contains those which affect the sovereign power of the state, and first in that class stands the crime of treason. This is defined by the constitution, and therefore the code could do no more than repeat the definition. But the same offence has the same definition in the constitution of the United States, and in both instruments is described as “levying war” and “adhering to enemies,” but from the nature of the federal union, a levy of war against one member of the union is a levy of war against the whole ; therefore it is concluded, that treason against the state, being treason against the United States, it is to be punished under their laws and in their courts.

There are, however, other offences which affect the sovereignty of the state, which do not amount to levying war or adhering to its enemies. The first of these is designated under the name of sedition. It is defined as an attempt, by FORCE OF ARMS, to dismember the state,

or to subvert or change the constitution thereof. This is one of the highest crimes that can be committed; and it must be observed that here, and elsewhere in this report, the degree of crime is measured by considering as well the moral depravity which it exhibits as the injury it occasions to the community. In this view it stands high in the scale of offences, and the highest punishment (imprisonment for life in the penitentiary) is awarded to it. A milder punishment is designated for him who shall excite others to commit this crime by writing or verbally. The employment of force is a necessary ingredient in the first offence, and expressly exciting others to use force in the second. Neither of these offences are provided for by our present laws (a).

Next in order, after offences against the sovereignty of the state, are those which affect its legislative power. The offences arranged under this title are—force directed against either house of the general assembly to dissolve their session, prevent their meeting, or direct their proceeding; threats of violence to a member to influence his vote, or actual violence in consequence of his official conduct; bribing or attempting to bribe, any such member, and the receipt of a bribe by him. These are forbidden under appropriate penalties, and with a proper definition of each offence. This class of offences has not yet attracted legislative attention, perhaps, because it was thought that some of them might be sufficiently punished or repressed in the exercise of the authority which is supposed to be inherent in all similar bodies, to punish contempts. Without entering into that question which, under our constitution, is not very easily decided, it may be sufficient to say, that if that power extends beyond the right of removing any immediate obstacle to the pro-

(a) The succeeding paragraph of the report,—relating to aiding and promoting slave insurrections,—has been omitted; there being, happily, no longer any necessity, in the United States, for legislative enactment on this subject.

ceedings of either house, and of enforcing its constitutional orders, it yet has not the power necessary for the occasion, inasmuch as the warmest partisans for the doctrine of contempts, do not contend, that any punishment the house can inflict, can exceed imprisonment during the session. It seems, therefore, proper, that an adequate penalty should be provided for the high offences mentioned in this title; and it is moreover consistent with the principles of our government, that every offence should be defined, and that the right of trial by jury, secured by the constitution, should be preserved inviolate. These are effected by the articles of this title, at the same time that whatever privilege is constitutionally vested in either house, remains unimpaired. Giving, offering and accepting a bribe are among the offences enumerated, and the punishment here assigned to it, is a suspension of political rights for five years, or fine equal to four times the amount of the bribe, and penitentiary imprisonment from six to twelve months for the person offering, and forfeiture of political rights, and fine equal to five times the amount of the bribe, for him who accepts it. The difference in the punishment was calculated to suit the probable situation of the several offenders, the tempter being treated more severely by the imprisonment, than him who yields to it; and the forfeiture of political rights is denounced, in this case, instead of a suspension; because, he who has once yielded to such a temptation, ought never again to be trusted with political power. Where the value of the bribe offered or accepted cannot be discovered, a standard rule is given in all similar cases for the measure of the fine.

Under the head of offences against the executive power, we have several highly injurious and immoral acts which are not now punishable by any of our statutes. Bribery is confined by the law of 1818, the only act we have on the subject, to bribing or offering to bribe, a "judge or other person concerned in the administration of justice," leaving the accepting a bribe by such judge or person

so employed, and the giving, offering, or receiving a bribe by any other totally unprovided for. By this chapter, it is extended to all executive officers, and the following offences, hitherto unnoticed, are added. doing official acts before the oaths and the security required by law are taken and furnished; forcible opposition to official acts; corruptly agreeing to make appointments, or do any other official act in consideration of an *advantage* (a) not allowed by law, and not being an *emolument*; extortion, which is fully defined; receiving an emolument not allowed, or greater than is allowed by law for doing official acts; committing any act which is an offence under colour of office; negligent performance of official acts, by which injury is received; all these are made offences, and punished by penalties which are supposed to be appropriate and commensurate to them; and articles are added extending these penalties to deputies, to persons exercising the office, although there may be an informality in their appointments; and making principals answerable for the acts of the deputy when they are done with his consent. The officers of corporations are also included, as well as those exercising *private offices*. This is an important title, and comprehends several offences, a few only of which will come within the purview of the existing statutes, under the loose description of misdemeanor in office.

First in rank under the head of offences affecting the judiciary power, are those relating to judges and juries, and of them the most important are those which may be committed by these functionaries themselves. The importance of these duties, the dreadful consequences of neglect or corruption in the performance of them, has attached, in all countries, a sanctity to the office of judge, which makes that a crime with him, which would be a venial fault in another. In all ages, therefore, while the

(a) For the understanding of this article, recourse must be had to the definitions of the words in italics.

public veneration has been readily yielded to the upright magistrate, the unjust judge has been the universal object of detestation and contempt. The highest rewards have not been deemed too great for his merits, nor the most cruel punishments too severe for his faults. Heaven itself must have inspired our British ancestors with the idea of separating the decision of law from that of fact ; for nothing could, with so much effect, lessen the danger of corruption. The jury, unapproachable by seduction, because not called into existence in time for it to operate upon them ; the judge, unable for the most part to decide without their intervention. But although this distribution leaves to neither the absolute power over the life or fortune or reputation that is put in the law's jeopardy—yet each of them have sufficient to make it necessary that their integrity should be protected from temptation, and their sense of duty stimulated by the law. There are some who think, that with respect to the judicial office, it would be degraded by enactments which suppose the possibility of its high functionaries being influenced by such inducements as would bias other men. Confidence, they argue, produces integrity, suspicion provokes to guilt ; leave the high characters of your judges to be sustained by their own sense of honour, and do not fetter them by any of the degrading restrictions and penalties, that you devise to bind other officers.

These have been the remarks suggested by men whose opinions deserve attention, on the chapter now under consideration ; and they were repeated so earnestly that I yielded more, I think, to respect than to conviction, and agreed to suppress the third article of this section, which prohibits a judge from receiving gifts of any assignable value, unless by will, or from a near relation. The reasons urged against it have been stated. Those which induced me, at first, to introduce the clause shall be given, that the general assembly may judge of the propriety of reinstating the article which they will find in the first printed copies.

I acknowledge the force of the maxim, that confidence in generous minds begets a disposition to merit it; but I deny the propriety of its general application. The penalties of law are founded on a supposition, that, without them, its precepts would not be fulfilled. Could we count on that generous disposition which the objection supposes, there would be no need of any sanction to our laws. The legislator need only point out his will and express his confidence in the integrity of those to whom it was directed, and the work of legislation would be done. But the argument is not pressed so far; it is acknowledged that penalties are necessary to insure obedience in ordinary cases; but, it is said, that judges form an honourable exception; restrain all the rest of the world by the fear of punishment—trust to the integrity of the judge for the performance of his duty. What, will you impose no restraint, no impeachment for corruption, no indictment for bribery? Yes, these we will allow—but he must not be restrained from accepting presents as the testimonials of friendship, which are no more than common courtesies of life. Now, if you can think it necessary to guard against the gross corruption of direct bribery, why will you permit a practice which is the most common mode of effecting it? Not to speak of their being made the vehicle for the more glaring crimes, their favourable effect on the mind of man is evident to any one who has the slightest knowledge of the world. Received as tokens of kindness at first, their slight value excites no suspicion; they are multiplied; their value is increased, and the obligation goes on augmenting until it can only be discharged by a favourable decree. But the practice ought to be forbidden, if it should have no other effect than that of exciting suspicion. If the judge has been in the habit of receiving presents of game or liquors from a suitor who gains his cause, the loser will not fail to attribute it to the flavour of the venison or the exquisite taste of the wine. Nor is the inhibition either

new, or considered as derogatory to officers of the highest trust. It is a constitutional provision that no one, holding an office of trust or profit under the United States, shall accept *any presents* from a foreign power. If this does not degrade the ambassador, why should a similar one degrade the judge? Besides, be consistent. You have two sets of judges. If those who determine the fact, when they are exhausted with hunger and fatigue, receive the slightest refreshment from one of the parties, you dishonour them by setting aside their verdict, as being corruptly procured, and often punish them for misconduct; and yet you think it degrading to the other class of judges, to prevent them receiving gifts of much greater value.

The other acts that are made punishable by this section are described with precision, so as neither to subject the officer to vexatious prosecutions, nor to suffer any judicial oppression or malfeasance to escape the animadversion of the law. This was the more necessary, because, by our statutes, although it is a crime to offer or give a bribe to a judge, there is no penalty denounced against him for accepting it (*a*), unless it be under the vague denomination of misdemeanor (*b*); to understand which we have not even the resource of a reference to the English law, for the statute which creates the offence was passed since the year 1805, and contains no reference to that law; and if we had, the matter would not much be mended, as we have seen in former parts of this report (*c*). When a word is used in legislation, that is neither technical nor explained in the law, it must of course be understood according to the signification it has in common parlance; but there can be no technical meaning affixed to this word, because there is no body of laws to which we are or can be referred for its explanation. We have no common law, and the statute refers to none, therefore it must have the same meaning here that it

(*a*) Act of 19th March 1818, sect. 5.

(*b*) Act of 7th June 1806, sect. 5.

(*c*) *Ante*, p. 138.

would in common conversation. What is that? Both etymology and usage give the answer; any misconduct whatever. A misdemeanour in office, then, is any demeanour that is contrary to official duty. Our present law, therefore, is infinitely more strict than that which is offered as a substitute; without defining any particular misconduct, by a sweeping clause it makes the minute-st inattention punishable by fine, imprisonment, loss of office, and incapacity ever to hold one. A rude or hasty word to an advocate, a suitor, or a witness, is misconduct, and so is corruption—both come within the meaning which etymology gives to misdemeanour. Should a judge do that for which he would fine a juror, come too late into court—should he yawn or doze on his bench during the sixth hour of a dull speech, the affronted orator would tax him with misconduct, and he might be vexed, although a jury probably might excuse him for indulging so natural a propensity; more especially if the speaker were one of those, like Virgil's priest—

"Spargere qui somnos, manu, cantuque, solebat"

Instead, then, of taxing the provisions of this chapter with improper hostility to the judicial character, and with imposing too great restraint upon the exercise of its functions, it ought to be considered, as it truly is, a relief from the danger of an ambiguous law, that creates a penalty which might, without departing from the words of the statute, be made by malice or ignorance to affect the fortune, liberty, and reputation of a respectable magistrate, for a trifling misdemeanor. In this section of the code, on the contrary, everything is defined—nothing made punishable but what is injurious, and the penalties are suited to the offence. In the first copy there was a material omission, by which a judge was inhibited from advising a suit, or giving counsel relative to its management, without making the necessary exception of cases of near relations, or any other in which he could not sit as a judge. This error is corrected.

By this section the necessary penalties are imposed on such misconduct of jurors as, by our present law, is either not punishable at all, or is so in a way that precludes the person accused from the benefit of a trial by jury, and the other advantages given by law in other prosecutions.

As, by the section thus reviewed, judges and jurors are restrained by penalties from acts contrary to their duty, so in the next they are protected from all attempts by bribery, violence, or improper persuasion, to seduce or force them from its performance ; and an article gives a precise rule on a subject left very much at discretion by our present practice. I mean the publication of proceedings in court during the pendency of a trial. It is believed, that the provision will secure the dignity of the court, the rights of the parties, and the liberty of the press.

The second chapter of this title is intended to prevent the bribery of ministerial officers of justice, and forcible opposition to them in the execution of their duties. The laws which embrace those offences, did not seem to be sufficiently descriptive of the acts which they forbid, and are totally silent as to a number of circumstances which ought to be explained. What are official acts ; what forms the judicial orders must be clothed with to make opposition to them an offence , in what cases and to what degree opposition is lawful ; what degree of opposition incurs the penalty ; what ought to be the conduct of the officer in the performance of his duty, so as to entitle him to the protection of the law, or to make him forfeit it ; are deficiencies in the present law, which are supplied by that which is offered.

Connected with this is the chapter on Rescue, to which nearly the same observations apply, with this additional reason for the amendment of the present law—that although it punishes the rescue of a person committed for, or convicted of, any other than a capital offence, yet a rescue for this last offence is only made punishable where the person rescued is indicted or convicted ; but

leaves the case of his rescue after commitment, but before he is indicted, wholly unprovided for (*a*). This error is corrected, and other provisions added, to make the law explicit and equal in its operation. In order to effect this latter object, the punishment, with some modifications to adapt it to particular cases, is one-half of that to which the party rescued would have been liable had he been convicted of the offence for which he was in custody, and a certain fine and imprisonment if he were confined on a civil suit.

Escape and breach of prison, are offences analogous to that of rescue. Adopting the principle of the English law, this offence, if committed without violence, is punished by a light fine and imprisonment. By our present law it is not provided against at all. If committed with violence, it incurs the punishment, and comes under the description of a forcible opposition to the officers of justice. If the escape is aided, or voluntarily permitted, by the person having charge of the accused, he incurs one half the punishment which might have been inflicted for the offence with which the accused was charged. The English law makes the punishment of the officer depend, in a great measure, on the conviction of the person escaping; for if such conviction take place, he suffers the same punishment with the delinquent; if he be acquitted or not taken, the keeper only suffers fine and imprisonment as for a misdemeanor. This rule, it was thought, would, in many cases, defeat the ends of justice. The risk of fine and imprisonment was not thought sufficient counterpoise to the bribes that might be offered by wealthy delinquents. The punishment assigned to this offence by the code, bears a proportion to the crime for which the person escaping was committed, because the injury to the community is greater in proportion to the magnitude of crime, and the temptation offered always increases in the same proportion, and it is incurred whether the party originally accused be acquitted

May 1807, section 36, as given in Martin's Digest, 2d

or be never retaken ; neither of which circumstances can lessen the guilt of the keeper. And allowing either to operate in his favour, would evidently make it his interest that justice should be avoided, either by effectual flight, or by the suppression of testimony necessary for conviction. If the escape be voluntary, the punishment is one half of that incurred by the crime charged on the prisoner ; if negligent only, it is one quarter.

It is somewhat singular that an offence of this importance, so deeply affecting the administration of justice, should not be provided against by our laws, otherwise than under the loose head of misdemeanor in office, which can only apply to civil officers ; but if the crime be committed by a sentinel set to guard the prisoner, or by a person having no office at all, it is unprovided against.

To break or attempt to break prison by the prisoner, legally imprisoned, when accompanied by violence, incurs the punishment of from six months in close custody to two years. Breach of prison for the purpose of rescuing another, is punishable by penitentiary imprisonment from two to five years ; and this does not depend on the legality of the imprisonment, as it does in the case of the prisoner himself. A lesser punishment is denounced against furnishing a prisoner with the means of making his escape, whether it be effected or not.

The seventh chapter of this title adapts, to the officers of justice, all offences described in the chapters relating to offences committed by executive officers.

The important duties attached to the profession of the law, have, in all nations where the law was a science, given its members the greatest influence, and sometimes made them obnoxious to the most unworthy suspicions. Deemed worthy to be trusted with the defence of the property, reputation, liberty and life of others ; they were yet subjected to have their own reputation blasted, their only means of subsistence forfeited, and, if not their lives, all that makes life desirable taken from them, for offences of all others the worst defined, by a summary process, in which the party injured was the prosecutor and the judge,

and his sentence was without appeal. There was, indeed, a corrective in the publicity of judicial proceedings, and the consequent force of public opinion, which prevented any great abuse of this dreadful power, but this was too uncertain a tenure by which to hold reputation or property. Public opinion, in its sound state, might protect, but when disordered by the madness of party or prejudice, would but stimulate oppression. Such a state of things was so little in unison with the spirit of our institutions, and indeed with the letter of our constitution, that it at length attracted legislative attention; and the members of an honourable profession were, by a law passed in the year 1823, placed on a footing with other citizens. The benefit of a trial by jury was in all cases, except that of contempts in open court, extended to them; and some definition was given to certain offences which they were supposed to be most liable to commit. This law I have made the basis of the articles of the ninth chapter of the title we have now under review, but the list of offences is extended, they are more accurately defined; and while the object has been to protect the honourable members of the profession, a proper increase of punishment has been denounced against those who may disgrace it by their cupidity or chicane.

A short chapter embraces the case of those who may falsely personate an officer of justice, or a suitor, or bail, or any other person. This was provided for by our statute, and also the case of a false personification for putting in bail or confessing a judgment.

Perjury is one of the offences which not only affects the administration of justice, but all the other operations of government in its various departments. By the English law this crime could only be committed by false swearing in some judicial proceeding. Our statute of 1805 wisely extends it to all cases in which depositions or affidavits are taken pursuant to the laws of the territory. Doubts might arise, under this statute, whether affidavits or depositions, taken under laws made subsequent to that statute, were included in it, and, also,

whether the affidavits and depositions intended were not exclusively such as were taken as evidence in a judicial proceeding. The code, by covering a broader ground, puts an end to those doubts. It defines the crime to be "a falsehood asserted verbally or in writing, deliberately and wilfully, relating to something present or past, under the sanction of an oath, or such other affirmation as is or may be by law made equivalent to an oath, legally administered under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defence of private right, or for the ends of public justice." This definition includes all testimony and judicial oaths whatsoever, whether oral or written; and it further extends the provisions of our statute so as clearly to embrace all other oaths which are required by law to attest the truth of any fact, such as declarations under the quarantine laws, and the like. In all of which cases the moral evil and the injury to the community may be as great as if the perjury were committed in a court of justice; yet a deliberate falsehood, asserted under oath, according to our present laws, would not be punishable at all, except it were connected with a judicial proceeding; unless special provision to that effect should be made in the law requiring the oath, which is frequently neglected where it is necessary, and for want of a general provision, such as the code contains, unnecessarily increases the length of our laws where it is not neglected. The definition excludes the breach of promissory oaths, such as oaths of office, from the guilt of perjury; because there the offence is not one that exists in taking the oath, which may be done with the sincerest intentions of keeping it, but in some act done subsequently, which may be inconsistent with it. If that act be sufficiently injurious to call for the animadversion of the law, it will be found to have been provided against under its proper head; if it be not, it is contrary to the principle of this code to punish it, however unconscientious it may be. For we cannot too often repeat, that the endeavour has been to place no acts in the rank of

offences, but such as were injurious, and were done either with a design to injure, or with an inattention to the rights of others, that is nearly as reprehensible.

This chapter punishes, under the appellation of false swearing, all deliberate falsehoods, asserted in voluntary affidavits, not taken in the course of judicial proceeding, nor required by law, but yet made the engines of detraction and other mischiefs; for which it is deplored by writers on English law that it affords no remedy. The punishment of this last offence is, of course, lighter than the former; but the prevalence of the evil seemed to require that it should be repressed by a penalty, and the nature of the crime suggested the further provision that a conviction for this offence might be given in evidence against the credit of the party, in any case in which he might be sworn as a witness.

On this head of perjury, too close an adherence to the English law led me to insert an article, which further reflection has induced me to wish may be erased. It is the second of the chapter, which provides for a case that will probably never happen, and can cause no injury if it should—the case of a witness swearing to a fact that is true, although at the time he believes it to be false.

The suborner to perjury is made liable to the same punishment with the principal offender. In this the code agrees with the present law; and it adopts the same measure with respect to false swearing. It also adds a lighter penalty on him who makes an ineffectual attempt to procure the commission of either of these offences.

The provisions of the eleventh chapter have excited much attention, and given rise to some severe strictures; on the work, as tending to deprive courts of justice of their only means of self defence; on the reporter, as being actuated by a spirit of hostility to the judiciary. The general assembly, I know, will listen without prejudice to my arguments on the first charge, and I hope will express his disapprobation of the second.

The power of punishing for comments on the extent

to which it has been carried, it is believed has never been justified by the plea of necessity. Its repugnance to all the fundamental principles which secure private rights in the administration of justice is so apparent, that no other argument can possibly be used. The offence is the showing a contempt for the court. Of all the words in the language, this is, perhaps, the most indefinite. Everything that can, by any process of reasoning, be considered as a disrespect to the court, is a contempt. Blackstone enumerates seven different species of consequential, as contradistinguished from direct contempts; each of them comprehending a countless number of different acts as distinct from each other in their nature, as all of them are from contempt, according to its strict definition. For instance, the second division of consequential contempts comprehends those committed by sheriffs, bailiffs, and other officers of the court, by deceiving the parties, by acts of oppression, by culpable neglect of duty, &c. In short, there is nothing—from an indecorous gesture or a rude, hasty word, up to the most violent opposition to legal authority—that cannot be brought within the purview of the law of contempts. Printing a false account of the proceedings of a court, or a true account while the suit is pending, without permission, as well as speaking or writing contemptuously of the court; treating a piece of paper, under its seal, with disrespect; and, to sum up all in the words of the apologist of the law of England, anything that shows a gross want of regard and respect.

Now I put it to those who contend that this power ought to be vested in courts, I put it to them to say, what is the conduct that will secure a man against its exercise in the hands of a vain or vindictive judge? “A want of regard and respect!” Regard and respect cannot be commanded but by moral conduct, and not always by that. The most correct conduct will not always secure it; the feeling is involuntary, and cannot be punished. But you must not show that you want it; it is the demonstration that is culpable. But how shall I avoid

showing it? When, in my own defence, or in the prosecution of my right, I differ from the judge, and show that the opinion he has given is absurd, certainly I treat him with very little regard or respect. I can feel none for a man who, by some miserable sophistry, deprives me of my right; and if I expose it to the world, I show my want of respect; but a want of respect is a contempt. I am, therefore, liable to be punished for defending my right in the only way that justice requires it should be defended. Oh! say the advocates of this tyrannical power, you must distinguish; attack the argument of the judge as much as you please, but say nothing disrespectful of the court. But what jesuit will teach me how I may tell a court that it has decided against the plainest principles of law, without showing that I think they have been ignorant, careless, prejudiced, or worse? When I know that, by reason of either of these faults, they are about to deprive me of my fortune or my life, can I feel regard or respect? When I state the reasons by which I demonstrate it, do I not—clothe it in what language I will—do I not make that want of regard manifest? And is not this, according to the very terms used by the author I have quoted, a contempt? It is amusing to observe the expedients which have been resorted to, to reconcile things that are irreconcilable; great respect for the judge and contempt for his opinion; professions of the highest veneration and regard, coupled with allegations that show the speaker can feel neither; introducing, among other evils, a fawning, hypocritical cant, equally unworthy of the suitors and the judges.

An offence so ill defined, so liable to be imputed, embracing such a variety of dissimilar acts, would be dangerous and oppressive in the extreme, were it to be prosecuted according to the ordinary forms of law; but all these are disregarded, none of them are preserved, and the plainest letter of the constitution is violated in its most sacred provisions. It declares that "in all criminal prosecutions, the accused shall have the right of meeting

the witnesses face to face, nor shall he be compelled to give evidence against himself." Yet process of attachment for contempt issues on an affidavit, and when the defendant is brought in, it is not to meet his accuser face to face, but, in direct defiance of the constitution, to "*give evidence against himself*," if he be guilty, under the penalty of being punished for a "high (v) and re-

(a) 4 Bl. 287. The mode of proceeding by attachment and interrogatories is adopted in our courts—I Martin, Territory v. Thurry—Same v. Nugent. In 10 Mart. 123, De Armas's case, the court punished for an indecorous expression by suspension for a year; and this case expressly supports the argument I have used in the first part of this report, that the Spanish penal laws are unrepealed, unless they are inconsistent with some statute of the state. In this case, several points are decided. First, that the law of Spain giving authority to the court, when a lawyer is "*arrogant . . . or is of ill fame, or is tedious, contradictory, or speaks too much, or any other like crime*," is in force, for it is expressly relied on as justifying the court for suspending the defendant from practice. Secondly, it is decided that this law is a *penal law*. Judge Martin says, "the Spanish law, which thus forbids the judge to suffer any contempt of his authority, is a *penal one*, for it cannot be carried into effect without inflicting some penalty." Thirdly, the full ground I have supposed the doctrine of contempt to occupy, is relied upon as law, for the same judge adds, "and a lawyer guilty towards the court of any contemptuous *action, expression, or gesture*," may be instantly punished, by suspension at least. Fourthly, the important point I argued for, that the laws of Spain are not repealed, unless there is a perfect incongruity or an absolute repeal, is declared to be law, supported by at least a dozen authorities. Nay, this case goes further than I thought it necessary to go, and preserves the Spanish law, even where the legislature have made a statute on the same subject; for the defendant was punished for a contempt by suspension for a year, although the legislature had declared that contempts should be punished by fine and imprisonment, because, says the same judge ‡, "there are no negative words, and the substance of the new act may well stand with that of the Partidas: the two provisions are not contradictory, and may fairly exist together." And he strengthens this reasoning by the authority of the superior court, 1 Mart. 129. Judge Matthew's opinion coincided with that of the other judge †; and he states the rules of repeal in so clear and methodical a manner, that if the book containing this report had then been within my reach, I should have adopted his reasoning instead of my own when I treated of this part of the subject; but although I recollected the case, I did not choose to quote it from memory.

* 10 Martin's Rep. 164.

† Ibid. 169.

‡ Ib. 172.

peated contempt." The punishment, by our statutes, is limited to fine of fifty dollars and ten days' imprisonment; but from the case cited in the note, it appears that the Spanish laws are still in force, unless there is an express repeal or incongruity between them and our statutes. With respect to counsellors and attorneys, there is such express repeal, but in no other cases (*a*). Now, in the variety of offences created by the Spanish statutes, many relate to the courts and judges, and to their officers and process; all these, by the sweeping definition of contempts, may be properly considered as such; and as the Spanish law has been decided not to be repealed by our law of contempts, the aggravated punishment may, in those cases, be inflicted as it was in the one referred to in the note. But without this, if the punishment is confined to that directed by our statute—is that nothing? Is it nothing to be deprived of liberty for ten days, without conviction—without jury? Is it nothing to be forced to give evidence against yourself? The magnitude of the punishment is comparatively of little moment. It is the principle that is dangerous. A free citizen ought never to hold his liberty, even for an hour, or the slightest portion of his property, at the will of any magistrate. But those I have noticed are not the worst features of this species of punishment. Vague and uncertain as is the definition of the offence, yet if impartial persons were appointed to decide, whether any given word, look, or gesture was contemptuous, there would be some security (a slight one, I grant) against oppression; but, as if it were to make this example one in which every principle of correct procedure was to be violated, the person offended is constituted the only judge—the judge without appeal; and lest his resentment should have time to cool, he is armed with the power of summary process—and if he want evidence, he may force the defendant to produce it. Let it not be said, as it sometimes is, that this is an advantage; that the defend-

(*a*) Act 27th March 1823.

ant may, by his answers to the interrogatories, exonerate himself. Not so. In the case of contemptuous words (and I see no reason why it should not extend to acts also), if he admit the speaking or the writing, the court have the right to judge of the intent as manifested by the words; and although the party should deny any disrespectful intent in the most unequivocal terms, the court may declare that the answer is false, and proceed to impose the punishment (a); and this power is given, too, in the very cases where it ought to be withheld. If it were confined to cases of actual injury, not only would the offence be more susceptible of proof—not only would there be a corrective in public opinion, which could be fixed upon the question, whether the injurious act had been committed or not; but the passions even of the party injured, if he were constituted the judge, would be less liable to be roused. It is a trite, and therefore, probably, a true observation, that men forgive injuries much sooner than insults. Judges (although by vesting them with this power we treat them as angels) are men; their passions will be more readily roused by real or fancied insults than they would be by injuries, and nothing can be more at war with justice than passion. Another evil—there is no end to them—is, that from the nature of the crime, its existence must depend on the temper of the judge who happens to preside. Words which a man of a cool and considerate disposition would pass over without notice, might trouble the serenity of another more susceptible in his feeling or irritable by his nature. There is no measure for the offence, but the ever variable one of the human mind. The judge carries the standard in his own breast; and if, by close observation, you have discovered its probable dimensions, your work is but begun, for every succeeding magistrate has his own scale

(a) 1 Mart., *Nugent's case*. It is true, the words used there, could not be reconciled to the declaration that no disrespect was intended; but if this case was correctly decided (and there is no reason to doubt it), the court have the right, in all cases, to judge between the answer to the interrogatories and the words used.

ence, and the operations necessary to existence. But society, as the superintending power, must have, for the purpose of securing these and all other rights belonging to departments and to individuals, the further power to punish. Society alone has this right. Try the law of contempts by this simple rule. Courts of law are the organs of one of the departments of society, and, to avoid confusion, we will select for our example courts of exclusively civil jurisdiction ; such courts have the right to defend their own existence, and to repress every thing that interferes immediately with the exercise of their legal powers. They have this right, as a legitimate part of society, by the principles of natural law ; and if it be curtailed by any constitutional provision, it is a great defect, because self-preservation very frequently requires immediate efforts that would make an application to any other power ineffectual. Every thing, then, that is necessary and proper to defend its existence, and secure the free performance of its functions, can with no greater propriety be denied to a court than there would be in forbidding an individual to defend his life against the attack of an assassin. But neither the court nor the individual have necessarily the right to punish, either after the attempt has been repelled or after it has been carried into execution. That is the duty and the right exclusively vested in the whole society. An individual has the right to defend himself against an attack upon his liberty or life ; but after he has successfully resisted it, he has no right to punish ; yet liberty and life are considered as sufficiently protected by this limited power. Courts of justice have the same right to repel all attempts to interrupt the performance of their functions. They are incorporeal beings, whose existence is only in the performance of their functions—that is their life—that is their liberty. They are, or ought to be, armed with every power necessary to defend them. Noise, interruptions, violence of every kind, must be repressed ; obedience to all lawful orders which are necessary for the performance of their functions, must be

enforced. Thus far the law of self-defence goes, but no further. Is the violence over—has the interruption ceased—is the intruder removed—has the order, which was disobeyed, been complied with?—here the power of the incorporeal being, as well as that of the individual in the analogous case, ceases, and the duty of the sovereign power begins. That alone must punish—that alone can define offences and fix the penalty for committing them. An infringement of the legal rights of a court of justice is an offence, and that government is radically defective which places the power to punish it in the hands of the offended party. Here, then, we find the limit of that necessity, which is so much insisted on and so little understood. There is a necessity that courts should have the power of removing interruptions to their proceedings, because, unless they can perform their functions they cannot exist, but there is none that they should have the power to punish those interruptions; the laws must do that, by the instrumentality of the courts, but in the form prescribed by law.

If the argument has been as clearly expressed as its force is felt, it must be convincing to show—that all those offences distinguished by the name of contempts ought to be banished from our penal law, which they disfigure by the grossest departure from principle; that courts ought to be empowered to remove all obstructions to their proceedings; that all such acts, as well as those tending to interrupt the course of judicial proceeding, to taint its purity, or even to bring it into disrepute, should be punished only by the due course of law; and that proper punishments, inflicted by the regular operation of law, will deter from these acts much more effectually than the irregular agency of the offended party, who sometimes, from delicacy, will abstain from enforcing the penalty of the law—sometimes, from the indulgence of passion, will exceed it.

It is on these principles that this part of the code has been framed. It vests ample powers of repression in the courts. They may remove every interruption to their

proceedings ; they may enforce prompt obedience to their orders ; they may, if simple removal is not found sufficient, restrain by imprisonment ; and, after this, a regular trial and punishment follows for the offence. Here is no angry altercation. All is done with the composure necessary to the dignity of justice. The judge is not the accuser ; the accuser is not the judge. All that class of offences, too, which consist in insulting expressions, are provided for. But here, again, an impartial jury decide, as well on the nature of the words, as on the intent with which they were used. The judge cannot improperly indulge his feelings, or restrain them, to the injury of public justice ; and the offender against laws for preserving the order and dignity of the judiciary is liable to the same penalties, entitled to the same rights, and judged by the same laws, that apply to other offenders.

This chapter, then, far from derogating from the respect due to the judiciary, is calculated, in all its provisions, to enforce it ; and the insinuation, that its author could be actuated by any hostility to that department, is not only groundless, but absurd. If, indeed, it is hostility to a department of government to desire that none but its proper powers should be vested in it by law, or, still less, should be exercised without law ; if it be hostility to the judiciary to divest them of the odious accumulation of the offices of judge, party, legislator and accuser in the same person ; to protect their functions in their exercise, and punish all attempts to interrupt them ; then is this chapter dictated by a spirit of the most determined hostility.

The next class of offences are those which affect the public tranquillity ; and they form the subject of the sixth title. The first chapter comprises two offences of this nature—unlawful assemblies and riots ; the first being a preparatory step to the second offence. They are both so clearly defined as not to be easily confounded ; and although both are taken, in their general features, from the English law, there are several modifications introduced, which, it is hoped, will be considered as

improvements. If the object of the one or the other offence be in opposition to the collection of taxes, or to a sentence of a court, or for the purpose of effecting a rescue, a definite increase of punishment is ordained, instead of leaving this entirely to the discretion of the court, which would have induced the necessity of an enlargement of that discretion in fixing the original punishment, so as to embrace the two cases. To encourage obedience to the law, it is provided, that if any one, either voluntarily or in obedience to the admonition of a magistrate, shall leave an unlawful assembly, without any intent to return, before a riot has been committed, that he shall avoid the punishment due to his assisting in the first offence. An increase of punishment is also directed against those who shall appear *armed* at such unlawful assembly or riot ; and to avoid all equivocation, the term is one of those that are designated as being used in the sense described in the Book of Definitions.

A proceeding, analogous to that of reading the riot act in England, is directed to be had by the magistrate, to disperse an unlawful assembly, or put an end to a riot ; but it is one that, it is thought, is better calculated to strike the attention, while its purport is equally or more intelligible to such an assemblage ; and it consists in the display of a flag, accompanied by a short proclamation ; the effect of disobedience to which is pointed out ; and in the correspondent chapter of the Code of Procedure all the forms are given, as well as the mode pointed out for calling out and employing the military, in aid of the civil power, when the first is insufficient to restore order.

An article in this chapter imposes a penalty on those exhibitions of pugilism which disgrace any society in which they are suffered.

Public disturbance is a minor species of this general offence, and it is made punishable by a slighter penalty, and may be repressed by the summary interference of the magistrate.

Articles containing negative provisions prevent any interference with legal meetings.

Offences against the right of suffrage form the important subject of the seventh title. Bribery, violence, undue influence, are endeavoured to be guarded against by enactments, sufficiently explicit to be understood without commentary, and by penalties proportioned and analogous to the several offences.

The eighth title would require much elucidation, if the subject of it had not already been submitted to the legislature, and if its provisions had not received their sanction and produced some strictures ; but being founded in true principles, the more closely it has been examined the more clearly has its utility appeared ; and if a novelty, it is not one of those that can be characterised as dangerous or useless. While we all profess a respect almost amounting to adoration for the liberty of the press, we may be permitted to wonder that it has, as yet, been protected by no penal enactments, while every code abounds with laws to guard against its abuse, and frequently, too, under that pretext, to destroy it. Our state has been more particular than most of the others, in guarding this precious privilege, by its constitution ; but the constitution could, of course, contain no penalty for a breach ; that care was left to the legislature. We cannot too often recur to the very words of our fundamental law on that subject ; full of foresight and wisdom, they are calculated to defeat every attack that might be made by open violence or insidious attempts upon this safeguard of our liberties : “Printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of the government, and *no law shall ever be made* to restrain the right thereof” (a). But if such a law should be made ; if a wicked and corrupt legislature should try to repress any discussion of their proceedings by heavy penalties ; and if a subserving judiciary should be found to execute their unconstitutional statutes, where is the remedy ? Should there be none ? Why should disobedience to this con-

(a) Constitution of Louisiana, art. vi, sect. 21.

stitutional law go unpunished? Surely the immorality of the act, and most surely its injurious tendency, are sufficiently apparent to call for and to justify repression and punishment. Surely the legislature, which provides a sanction for this wise and highly important law, are performing a sacred duty.

Again: this was a favourite theme with the framers of our constitution. They seem loth to quit it while any thing remains to be said that could show the high regard they had for this privilege. They add: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." But if that freedom, thus intended to be secured, is endeavoured to be shackled by threats, by actual violence, by the illegal exercise of judicial power, under pretence of an alleged abuse? Are not laws tending to restrain these abuses worthy of the attention of the legislature when it is forming a system of penal law? Either the privilege was not worth all the care and attention which has been given to it in the constitution, or it is worth that of the legislature to protect it. Without some law of this kind, the constitutional provision can have no efficient operation. But with the aid of the penal law, it receives the force and effect which its importance merits.

A very superficial attention to one of the articles has produced an objection that seems to have had some weight, but which is entitled to very little. The article imposes a penalty on any judicial or other officer who, under pretence of any law which contravenes the constitution in this respect, shall restrain or prevent the exercise of the liberty of discussion secured by the constitution. Now, it is said, if a legislature be found wicked enough to pass such an unconstitutional law, they will also, to secure its execution, repeal that part of your code, and your penalty then goes with it. This objection was anticipated in the first report, and it was answered that attacks upon the privileges of the people are, for the

most part, insidiously made under pretence of public good, and clothed, at least, with a specious regard for constitutional forms ; and that a repeal of this part of the code would take off the mask and put the friends of the people on their guard, and therefore it would not be attempted ; or, if it were, that the repeal of this part of the code, like the attack of an outpost, would put the main body on their guard. Another reason may now be added : that a law infringing that important part of the constitution might be passed, not from any direct hostility to the liberty of the press in general, but for the purpose of some party advantage or other temporary motive in troublesome times ; and, in such case, it would not be accompanied by the repeal of the code. Again : the existence of this article in the code, at least, forms an additional security, for members might be found to concur, from interest or passion, in abridging the liberty of the press, who might not go the length of repealing the article ; and every additional security which is attended with no inconvenience—and none can be even supposed here—is of the highest importance. And, finally, admit that it may be rendered nugatory by a repeal : yet, if it should be of use until that repeal takes place ; if it should defeat one unprincipled attempt to destroy this sacred privilege ; if it should only give time for its friends to rally in its defence, it would be of inestimable value.

As expression, also, of legislative opinion, its importance is not small ; and the vigilance which it testifies in the guarding of constitutional rights will not only reflect honour on those who pass it, but teach the people how to appreciate those rights which they see thus carefully enclosed with penalties.

One more reflection, and I dismiss the subject with a simple reference to the chapter which contains nothing that needs an explanation to elucidate any further the several offences and their punishment : that reflection is this,—that there is no one possible inconvenience attending the execution of any of the enactments of this chapter.

No penalty can fall on any person who does not openly and wilfully violate one of the most important parts of his country's constitution; no ambiguity in the definition of the offences; no undue severity in the punishment. It is new! This is the "very head and front of its offending;" but it is not dangerous. It is believed to be necessary and highly useful.

The ninth title relates to offences affecting public records: on which subject we have now three provisions in the 19th and 20th sections of the act of May 1805, and the 8th section of the act of 19th March 1818. By the first it is forbidden feloniously to steal, take away, alter, falsify, or otherwise avoid any record, writ, process, or any proceeding in any of the courts, under the penalty of fine to three thousand dollars, and imprisonment at hard labour not exceeding two years.

The second provides that those who shall deface, alter, or embezzle any record, or enrolment, or matter, or instrument recorded, or registry thereof, with intent to defraud, shall pay a fine to one thousand dollars, be imprisoned at hard labour to two years, and be rendered incapable of holding any office.

By the third, if any person shall forge, or counterfeit, any public record or attestation of a public officer, where such attestation is legal proof, he shall be punished by solitary imprisonment to one, and at hard labour not less than two nor more than fourteen years.

Thus, taking these sections together, we find, first, that to steal or alter the record of a court may be punished by a fine of one cent and imprisonment for one hour, but that the fine cannot exceed three thousand dollars nor the imprisonment two years; whereas the minimum punishment for forging a record of enrolment is exactly the maximum that is inflicted for stealing or forging the record of a court, unless the general expression, record, in the third act, should be construed also to include court records; in which case there would be the difference I have stated between the punishments for stealing and for forging the same record.

Secondly, that there is a difference in the punishments of the two offences, designated in the first two sections respectively, that does not seem to be warranted by any distinction between them, in moral guilt, or public or private injury.

Thirdly, that in a fair construction of the words employed, all three of the sections include the same offence, to wit, forging the record of a court. The first designates, as one of the acts it forbids, to alter, falsify, or otherwise avoid any record, or other proceeding in any court. The second, to deface, or alter, or embezzle any record, enrolment, or matter of record, &c. The third, to forge, or counterfeit any public record. All of these have different penalties. Are they all to be inflicted? The reasoning of the court (*a*), above quoted, would seem to decide the affirmative of this question, for none of them contain a repealing clause, and two of them are in the same act. Yet, if they are, what confusion must ensue. This evil is remedied by the code, these, and all other offences of the same nature, are clearly described; all the words used in the description are defined; and the distinction, between the guilt and mischief, where an officer, who has the custody of the records, betrays his trust, by falsifying or destroying them; and the same crime committed by any other individual, is marked by an increase of punishment. In this, as well as in a subsequent title, the law is simplified by using a general description of the records intended to be protected against falsification and other injury, rather than by an enumeration, which is generally made imperfect in a few years by other instruments coming in use, which it is also necessary to protect. False certificates of recording officers, personifications to execute, or acknowledge, or prove authentic instruments, are provided against; and a section, describing what shall be deemed a fraudulent use of a forged record, will, it is believed, clear up doubts that have heretofore existed on that subject.

(*a*) 10 Martin.

The title of offences against the current coin of the state, is so drawn as to embrace every offence of this nature. There is, among others, a section making it penal to possess counterfeited coin with the intent to pass it as true, either in the state, which is the provision of the present law, or to send it, for that purpose, into any other of the states, or into a foreign country. This is new in penal legislation, but it was thought honourable to the state to prevent its being made a den, in which coiners might carry on their fraudulent manufactory to the injury of other countries, whether enemies or friends ; and as one step towards the application of that golden rule, "to do as we would be done by," to nations as well as to individuals. These advances need only be begun ; they will be reciprocated ; each will promote its interest as well as its honour, by making or meeting these advances, and from the most trifling beginnings, consequences most important to human happiness may result.

The great evil to the revenues of the state, arising from a misapplication of public moneys by those entrusted to receive them, was seriously considered, and a preventive remedy is proposed, which, it is thought, will in a great measure take away the temptation to the offence. A forced deposit of all moneys, by leaving no large sums in the possession of the party, will leave him little inducement to incur the penalty ; and the measures described in the code, are such as cannot fail to bring on detection in case of disobedience. After the deposit is made, it cannot be withdrawn without a deliberate crime, the commission of which, in the nature of things, cannot remain concealed. In ordinary cases, this breach of trust is made with the design of replacing the money before it can be called for ; and this honest intention palliates to the party the irregularity of the conduct. But if this was to be preceded, before any advantage could be made of the money, by a false check, that must remain on file and insure the conviction of the party, he will, nine times in ten, refrain from the offence, and the revenue will be free from this risk.

Extortion by collectors, or violence against them, are equally provided against.

Under the head of offences which affect commerce and manufactures, we have, first, those which affect foreign commerce.

These are offences against the inspection laws, shipping articles without inspection, when it is required by law; and counterfeiting marks or brands of the proper officers. The frauds which have been but too common in packing articles of little value in boxes or balcs, intended for exportation, are punished by an adequate penalty. Destroying a vessel on the high seas, by the master or mariners; frauds against insurers, either in or out of the state, by shipping articles of inferior value; and any act done in the state, preparatory to a fraud to be completed abroad; or any such act done out of the state, if the fraud is to be completed within its limits, make the party liable, and this in virtue of a principle that has been before discussed.

A chapter regulates the conduct of tavern-keepers in regard to seamen; and refers to the existing laws on that subject, it being rather a matter of police than of penal law.

A short chapter contains the usual and simple penalties against using false weights and measures; and another has some new enactments to punish the fraudulent use of false marks on merchandize, which usually denote the quantity or quality of the article contained in the package.

The next class of offences, which may be distributed under the head of those which injure the commerce, manufactures, or trade of the country, are those affecting the validity of written contracts—a most important title in the criminal law of modern times, although scarcely known in the simple code of our ancestors, in the middle ages. Among the offences of this class, forgery is the most prominent. As was natural, it has closely followed the footsteps of paper credit. It has increased with increasing commerce, and thrives most where the circu-

lation of bank paper is most widely spread. In England it was an offence at common law, but it could not be very prevalent at a time when commerce was barter, and when the evidences of public and private credit, being alike unknown, little inducement was offered for the exercise of the ingenuity of the very few who had learning enough to commit the offence, being then neither felt nor apprehended as a serious evil, it was punished only as a misdemeanour.

By the first statute (8 Richard II. c. 4) it would appear that this crime was only apprehended from judges and clerks, and in the falsification of court records alone. From the provisions of the statute of 8 Henry VI. we may judge that it began to make some progress, that others, besides judges and clerks, tampered with the records, and that the evil was sufficiently prevalent to require a severe penalty; for by that statute the offence, by whomsoever committed, is raised in the calendar of crimes to the rank of felony. But by the operation of a clerical privilege, this law had the effect of exempting from punishment the only persons who were enabled to commit the offence; while its penalties could be enforced against those only who were under a physical incapacity of incurring them, although the crime could be committed by none who could not read, the knowing how to read was the certain means of escaping punishment, which was only inflicted on those who demonstrated, by their ignorance of that art, that they were not guilty. This absurdity continued until late in the reign of Elizabeth. We then find the government first beginning to pay some attention to the subject. Their statutes, however, protected no species of written contracts, until experience had shown that it became the object of the offence, and its prevalence forced them to legislate; but even then, they carefully restricted their protection to that species of writing which called for their immediate attention, leaving all others to form the subject of another law, when their introduction into commerce should tempt the hand of the forger to counterfeit them; so that the English statutes

might serve as a chronological catalogue of the securities successively in use, from the time of the first statute to the present day.

The first enactments on this subject are, I believe, the statutes of Richard II. and Henry VI before referred to. Neither of those relates to any other forgery than that of records. From that time no other writing seems to have claimed the attention of the law, until the fifth year of the reign of Elizabeth, when the forgery of deeds, charters, sealed writings, court rolls and wills, by one section, and by another, that of obligations, acquittances and releases, was punishable by mutilation, imprisonment and forfeiture. During this reign there is but one other law on the subject (*a*), which relates to soldiers' and mariners' passes, and makes the forgery of them felony, without benefit of clergy. From this time, for more than a century, I find no statute referred to in the treatises on this subject, but they multiply afterwards in an extraordinary ratio. There are two in the reign of William III—five in that of Anne—eight under the first George—ten in the reign of his immediate successor—and thirty-seven from the 1st to the 45th of George III., since which I have no account, making, in all, more than sixty statutes, bearing on different modifications of the same offence.

This legislation was inevitably confused from its prolixity. It was also, from its nature, in some degree inefficient. By attempting the difficult, perhaps the unattainable, object of protecting every species of writing by name, it constantly left some unprovided for, and, of course, open to the enterprise of offenders, until the statute, like the "*Pœna pede Claudio*" of the poet, came limping behind it with a new penalty. But the application of this penalty was attended with new difficulties from the defects of the system. As each penalty was denounced against those who falsified a particular instrument, it was necessary, in the act of accusation, to charge

(*a*) Stat. 39 Eliz

that the writing in question was one of that particular class. A mistake in this nomenclature has proved fatal to more than one prosecution.

Another source of uncertainty in this system is, that a change of circumstances and habits in the country, may render the law obscure and sometimes unintelligible. The name by which certain writings are designated in the act, may be well understood at the time of its passage, and afterwards, by disuse, become wholly unknown, at least to the people; for instance, in the territorial law of 1805 it is made forgery to counterfeit a *cotton receipt*. This instrument is understood in those parts of the state where cotton is the staple commodity, to mean a kind of negotiable receipt, given by the owners of cotton gins, to their customers, for cotton brought to be cleaned; but in the lower part of the country, I doubt whether it is, even now, generally understood, and certainly it would not be, if either that species of culture were abandoned, or if, by the invention of some cheap machinery, every planter should clean his own cotton. In either of these cases, the term might be applied to some instrument for which it was never intended.

Our legislature might have avoided these inconveniences, but unfortunately they proceeded on the same vicious plan, of enumeration, which had been adopted in the statute law of England; and as might have been expected, with the same effect; although in framing our law of 1805 we had the English catalogue before us, and might cull from her statutes all the writings which we wish to add to those in use among ourselves, for the purpose of protecting them against forgery; yet since that period, two other statutes (a) have been found necessary to increase the list; and in progress of time, our statute book, unless some other system be resorted to, may on this head, vie in prolixity with the "statutes at large."

The means of avoiding these inconveniences are so

(a) Acts of 22d Feb. 1817, and 26th March 1818.

obvious, that I was, at first, inclined to think that some insurmountable objection, which I could not discover, must have prevented their adoption. But when the most deliberate exercise of my judgment could suggest no such objection, I ventured upon the description of the offence, not by enumerating the different writings which should be its object, but by a definition, intended to embrace all those which it is the policy of the law to protect by the high penalties attached to the crime of forgery, and to exclude all those which, from their nature, ought not to be the subject of that sanction. This change is offered with some confidence, because the foundation of it is laid in the definition of this crime by the common law, which, as far as my reading and observation have gone, has given rise to much less uncertainty of decision, than has taken place in the practice under the statutes. By these means all the uncertainty, arising from an erroneous charge in the indictment, as to the species of contract, and it is no small item, will be avoided. It will be, hereafter, only necessary to describe the effect of the instrument, not to declare to what class of contracts it belongs; and every instrument, which the convenience of commerce or the extension of obligations may introduce, will, at once, be protected by the law, without a new statute to add its name to the list. The next change from the present system, which is proposed, grew naturally out of the first. By the thirty-third section of the law of 1805 it is enacted, that "all the crimes, misdemeanours, and offences, therein enumerated, shall be taken, intended, and construed according to, and in conformity with, the common law of England." This has always been construed into an adoption of the common law definition of the several offences which are made punishable by our statute law, where the statute itself gave no other definition. But by the common law some acts were considered as forgery, which could not be brought within any reasonable definition of the offence: if a man, who had made a conveyance, should afterwards execute another of a prior date, for the same property, with intent to defraud; or if he passed a note, signed by

himself, pretending that he was another person who bore the same name, but had better credit, or if he procured the execution of an instrument which had been secretly altered, or substituted one for another before agreed upon, all of these acts were classed under the head of forgery. They can be placed there, however, only by an arbitrary arrangement, which destroys all systems, and sets definition at defiance. They have this, in common with forgery, that they are all fraudulent acts, and are all committed by means of written instruments, but forging implies falsification of an instrument, and cannot be committed by the fraudulent use of a true one, or by the alteration of a writing before it becomes the act of any one.

I have, therefore, characterized them as offences affecting written contracts, and annexed to them different measures of punishment, proportioned to the offence, but have not considered them as forgeries. In the definition I have offered of forgery, the intent to defraud is equivalent to the actual completion of that part of the offence. In that the new plan coincides with the present system; but it differs from it in this, that no particular person need to be assigned, as the one on whom the fraud was intended to be practised. The necessity for this designation, and the uncertainty of the proof, leads now to the escape of the guilty. But although the allegations of fraud be general, it can never injure the innocent; for if it does not appear from the instrument, it must always be strictly proved. An inspection of the different articles of this chapter will render any further exposition of them here unnecessary. If its provisions are well drawn, it provides for all those offences affecting the validity of written contracts, which have been deemed worthy of punishment by the English law, or which require it under our state of society. The falsification of other writings, not affecting property, such as public records and other official acts, is provided for in other parts of the code.

Although, by the general plan, all the definitions of technical words used in the code are collected in the book designated for that purpose, this order is deviated from.

in cases where words or phrases are used exclusively in relation to any particular offence, in which case they are sometimes placed as articles in the section which treats of the offence. This deviation is more perceptible in this chapter than perhaps any other in the code, and it extends in this instance so as to embrace definitions of some words that are not used exclusively in regard to the offences contained in that chapter. It was resorted to in order to bring into one view every thing necessary for the full understanding of an important class of crimes; but, in all such cases, the same definitions will be found repeated in the Book of Definitions.

In order to give a connected view of all the changes that are proposed as well in the prosecution as of the definition of this class of offences, I must anticipate here some observations which regularly would find their place in the introductory discourses to the Code of Procedure and the Code of Evidence. As to the first; that part of the Code of Procedure which relates particularly to prosecutions for offences under this chapter, contains some provisions which require particular notice. One great inconvenience in the present system, has already been hinted at; the necessity of giving the false instrument a name in the indictment, in other words, of charging that it purports to be a receipt, a note, or some other of the writings which are specifically enumerated in the various acts. By substituting a definition instead of such a catalogue, this difficulty in the practice is avoided. Another very fruitful source of captious exceptions arose from the necessity of setting forth exact copies of the instrument in the indictment, a mistake in which led always to delay, and sometimes defeated the ends of justice. It is thought that the provisions on this subject will effectually prevent this evil, while, at the same time, they assure to the accused every degree of certainty in the accusation, necessary to a full understanding of the charge, and every facility which justice and humanity require for making his defence. The hope of escape, by some technical exception, animates every culprit; he

generally overrates his chance of acquittal from this source; and it is, therefore, a point of the greatest importance to cut off this hope of impunity, to convince the accused that no defect of form can under any circumstances, procure his escape; and that the only chance of safety lies in an acquittal on the merits. This conviction, once deeply impressed on the minds of offenders, and counteracted by no examples of impunity from defects of form, will have the happiest consequences, particularly in this description of crime, in which these objects are at present most common, and on which, well or ill-founded, the guilty place the greatest reliance for escape. To effect these important ends, provision is made in the Code of Procedure, that before the defendant can be called to plead, he shall be furnished with a copy of the instrument said to be forged, have an opportunity of comparing it with the original, and at a time assigned be called on to produce his objections, either for any variance, for misnomer, or any other defect of form; these are to be disposed of in a manner directed by the code, before the plea; and then the trial takes place, divested of any other inquiry but that on the merits.

This part of the Code of Procedure provides also simple forms of indictment for every offence contained in the corresponding division of the work, and for every modification of these offences; from which it has been endeavoured to discard all superfluous allegations, but to give to the accused all necessary information of the nature of the charge against him; but a close adherence, even to these forms, is not rendered essential, and means are taken, and it is hoped effectual means, to remedy every evil arising from exceptions to defects of form. I now pass to the consideration of a few rules of evidence, contained in the Code of Evidence, applicable particularly to trial for offences of this class.

By the English law, the person whose name is forged, was not admitted as a witness to prove the forgery, if any suit could have been supported against him on the instrument, if it were true. This exclusion is, by the

English jurists, endeavoured to be reconciled to the general rule, that direct interest alone shall be deemed an objection to the competency.

1st. From the consideration that the forfeiture consequent on conviction vested all the property of the offender, and, of course, the instrument on which he was convicted, in the crown, who neither could, nor would, enforce the payment of it after conviction ; and that, therefore, there is an evident interest in the witness to procure such conviction

2nd. That it is the practice of the courts to impound the instrument on which a conviction for forgery took place ; that is, to keep it in the hands of their officer to prevent a fraudulent circulation, and therefore it would be the interest of the witness to procure a conviction, because, in that case, the difficulty of succeeding in a private suit would be insurmountable.

The first of these reasons cannot apply here, where forfeiture is unknown ; and the practice on which the second is founded, is so modified in the new code, as to give facility to the bringing a civil suit, even on an instrument which, in the criminal court, has been declared a forgery. There can therefore be no foundation for alleging an interest, that would render the witness incompetent under our law ; and to exclude him for any other of the reasons usually alleged, would be a departure from principle, and destroy the harmony which ought to prevail between the rules of evidence in criminal and civil cases. It is true, that a bias may not unreasonably be suspected in such a case against the prisoner. But it is one that can be appreciated by the jury, and therefore ought to go to credit, rather than competency.

“ In adopting this rule you will only sanction what has heretofore been practised in this state, and in several others governed by the principles of common law ; but as there has been a diversity of decision on this point, and as the English rule is at present observed by our courts, it was thought proper, for the reasons alleged, to abrogate it by a legislative provision.”

The chapter on fraudulent insolvencies has been framed with a view of making it applicable to the present system of insolvent laws, or to any other that may be substituted for them. The great evils to be apprehended in those cases being, the concealment of property, the fraudulent conveyance of it, and the creation of fictitious debts. All these have been provided against, by penalties applicable as well to the dishonest debtor as to the persons who may colleague with him, to the injury of the creditors. These penalties extend to penitentiary imprisonment for making a false and fraudulent schedule of property or debts, or for wilfully destroying books or papers, with a design to defraud. The other offences being such measures as are, for the most part, resorted to in moments of embarrassment and trouble, not showing such depravity as calls for the discipline of the penitentiary, it was thought would be sufficiently corrected by suspension of certain political and civil rights, and by imprisonment. The circumstances of the insolvent forbade the addition of any fine to his offence; but it forms part of the punishment of those who collude with him, and who may be supposed to have the means of paying one.

By the single article of the thirteenth title, respecting offences affecting public property, it is declared, that all the provisions for the protection of private property, apply also to that of the public. And in the fourteenth title is also comprised one general provision referring to the ordinances of the juries of police, and the public corporations of cities and towns, for the laws respecting the making and enlarging the levees, roads, bridges, streets and public squares, and for the penalties they impose for a disregard of them; it having been found impossible, in a permanent system, to provide for the varying legislation that the changing nature of the subject would require; or, in a general system, to embrace all the circumstances which the local police might require. But two chapters under this title, contain the only enactments on this subject, which, from their nature, could be justly made permanent and co-extensive with the state in their local

operation. These two chapters are based upon the present law, and, therefore, need no further elucidation.

The fifteenth title relates to offences injurious to public health or safety. At the time it was written the Code of Public Health was in force. As it has since been repealed, it is presumed that the legislature do not consider any provision against the introduction of infectious and contagious disorders to be necessary, and the chapter on that subject is suppressed. The first chapter of this title, as it now stands, imposes a penalty on all those who store gunpowder in greater quantity than ten pounds, within one hundred yards of a dwelling-house, or public road, or the land of any person who does not give his consent ; who carry on trades injurious to the health of those who live in the vicinity ; and against those who adulterate provisions, liquor, or drugs, so as to make them injurious to health.

Offences against morals are the subject of a title containing four chapters

The first relates to disorderly houses, and its provisions coincide substantially with those of our statute, but the offences are more precisely defined.

The second chapter contains prohibitions entirely new in our law, although they form a very comprehensive part of the English common law, under the title of Offences against Decency. This is quite undefined in that law. In the chapter which I present, it is restricted to four cases : indecent exposure of person ; insulting and indecent language to a woman ; deliberate seduction, under promise of marriage ; and the infamous agency of ministering to the vices of others. Seduction is not, I believe, punishable in England, unless preceded by a conspiracy ; nor in any manner whatever by our statutes. Yet, if we consider the base profligacy of the act, by which the most implicit confidence is betrayed, and the most solemn promises are deliberately broken, not only to the utter ruin of the unsuspecting victim, but to the disgrace and misery of her connexions, it is one in which the immorality of the act, and the misery it inflicts, both require exemplary punishment.

Although the private excesses of the passion between the sexes cannot, with propriety, be made the subject of penal law, yet public opinion, in all nations, has marked, by its decided reprobation, him who, without being excited by his own passions, ministers to those of others for gain, and in that vile office frequently seduces innocence, or purchases the influence of infamous or necessitous parents to the dishonour of their child. The indication of public sentiment has, on this occasion, been pursued, and the act has been made penal by the code.

It seems right and proper that the law should lend its aid to punish all acts against individuals that provoke a just resentment, which will naturally vindicate itself, if the law refuses its aid. It is for this reason that the article, imposing a penalty on indecent and insulting expressions to a woman, has been added. It has been considered, by one whose authority and opinions I highly respect, as descending into minutiae unbefitting a penal code, and as one of those offences to be repressed by public opinion or the fear of private chastisement, rather than by law. If the force of public opinion were a sufficient sanction, I should have proposed no other; but it is because its insufficiency is acknowledged, and private resentment is proposed to aid its operation, that I propose to substitute the regular action of the law to the uncertain penalty of individual passion.

Whether adultery should be considered as an offence against public morality, or left to the operation of the civil laws, has been the subject of much discussion. As far as I am informed, it figures in the penal law of all nations, except the English; and some of their most celebrated lawyers have considered the omission as a defect.

Neither the immorality of the act, nor its injurious consequences on the happiness of females, and very frequently on the peace of society and the lives of its members, can be denied. The reason, then, why it should be punished, does not seem very clear. It is emphatically of that nature in which I have just referred, in

which the resentment of the injured party will prompt him to take vengeance into his own hands, and commit a greater offence if the laws of his country refuse to punish the lesser. It is the nature of man, and no legislation can alter it, to protect himself where the laws refuse their aid; very frequently where they do not. But where they will not give protection against injury, it is in vain that they attempt to punish him who supplies, by his own energy, their remissness. Where the law refuses to punish this offence, the injured party will do it for himself; he will break the public peace, and commit the greatest of all crimes, and he is rarely or never punished. Assaults, duels, assassinations, poisonings, will be the consequence. They cannot be prevented; but perhaps, by giving the aid of the law to punish the offence, which they are intended to avenge, they will be less frequent; and it will, by taking away the pretext for the atrocious acts, in a great measure insure the infliction of the punishment they deserve. It is for these reasons that the offence of adultery forms a chapter of this title

Different punishments are awarded, to the unfaithful wife—to the inconstant husband, who is so regardless of honour, and decency, and public opinion, as to keep a concubine in the house with his wife, or to force her, by ill-treatment, to leave it and give place to the usurper of her rights. The reasons for this distinction, between the offence of the husband and wife, are obvious, and founded in nature. The paramour of the wife is also punished by fine and imprisonment; and to avoid collusions, no prosecutions against the wife can be carried on unless the partner of her crime is joined in it. This regulation, too, will be some check to the heartless seducer, who might otherwise look with indifference on the penalty suffered by another for the crime of which he was the principal cause.

It is provided, under this head, that no prosecution for this offence shall be commenced but on the complaint of the injured party, and that it shall cease if they become reconciled before sentence.

The respect paid to the bodies of the dead, which from its universality would seem to be a natural sentiment, has suggested, in all countries, laws, or customs having the force of laws, forbidding as a kind of sacrilege the violation of the receptacles for human remains, whether they be embalmed, interred or consumed. The catacomb, the grave, and the urn, were held equally sacred; and any intrusion upon them has always not only been considered as immoral, but punished as a crime. It is in vain that pretended philosophy affects to consider it as prejudice. The feelings of the philosopher belie the language of his wisdom; and however indifferent he might feel as to his own remains, he would not see without affliction, the body of a friend or relation torn from the grave, even to promote the progress of science. It is in vain that we are told, and are truly told, that the health and life of the living ought not to be sacrificed to a vain respect for the body of the dead, incapable of suffering here, or feeling the ignominy of exposure; the reason may be convinced, but the feeling remains. Science must be content with subjects whose dissection will interest the feelings of none who are alive. The bodies of those few, who, themselves above this prejudice, devote their remains to the cause of science; those of malefactors who die in the imprisonment inflicted by the law, must suffice for the improvement of surgical knowledge. But the laws must protect, in the place of their lasting rest, the remains that are sacred to the memory of surviving relations or friends. This natural feeling has not been neglected in the code which is presented, and a proper punishment is denounced against every violation of the sanctuary of the tomb.

We have now closed the review of those offences which, powerfully affecting the community in general, have been classed as public offences. The seventeenth title commences the other division, distinguished as Private Offences, and first of these stand such as affect individuals

of penal law this title is much more extensive. It there embraces a species of offences carefully excluded from this. In those systems the dominant religion is personified, and rendered by this fiction subject to be injured by investigating its truth, or doubting its divine origin. Nay, the Supreme Being himself is sometimes impiously substituted for the mode of worship or tenets of faith which prevail in the state, and his almighty power is protected by vain laws to punish "offences against God and religion" (a). The code offered to you does not contain this absurdity. The exercise of religion is considered as a right: an inestimable one. It is restrained only by those limits which must restrict all rights, that they do not encroach on those of another; or, in other words, do not change into wrongs. All articles of faith, all modes of worship are equal in the eye of the law: all are entitled to equal protection. The fallibility of human laws does not undertake a task to which unerring wisdom alone is competent. The weakness of human laws does not attempt to avenge the cause of infinite power; and injuries and insults to the Deity, are left to the being who asserts his rights to the exclusive cognizance of such offences: "Vengeance is mine; I will repay, saith the Lord." The code has not ventured to trench on this divine prerogative; but the provisions of this title will be found to repress or punish any wanton, or intolerant attempt to disturb or persecute; while every necessary authority is secured to religious societies for the preservation of order among their members. So that the general principles announced in the preliminary chapter to the code, taken in connexion with the provisions of this title, evince that this state will give effect to the noble experiment that has so successfully been tried in these republics—of giving perfect liberty to conscience—perfect protection to all religions, and substituting perfect equality for insulting toleration; an experiment which demonstrates how fallacious is the argument of a necessary connexion

(a) 4 Bl. 43.

between church and state ; which shows that true piety may be preserved amid a variety of religious tenets , and proves that liberty in religion has the same influence on the great virtues, which all sects consider as essential to produce eternal happiness, as liberty in government has on those which are the basis of political prosperity.

To repress injuries to reputation, is a duty more incumbent on legislation since the introduction of printing has given so many facilities to assail it, but the task is rendered more difficult, because the same instrument, usually employed in the work of detraction, is one that is necessary to spread information, promote science, support political and civil liberty, and propagate the truths of religion. To permit its unrestrained employment for these noble ends, and at the same time prevent its being used as a means of destroying reputation, is the task that must be performed if we wish to preserve consistency in this important division of our Penal Code. This, it was believed, could be done only by defining the offence, and then laying down as deductions from such definition, a set of negative as well as affirmative rules, declaring what species of assertion shall be punishable as illegal attacks upon reputation, and what shall be permitted in order to avoid the greater evil of restraining the proper liberty of speech and of the press. In performing this task, alterations have been made in the present law, which were necessary to adapt it to the letter and spirit of our constitution ; the provisions of which have been adverted to in that part of the report which treats of offences against the liberty of the press. These provisions will be pointed out, although not in the order in which they stand in the chapter.

1. The undefined, and perhaps undefinable, offence of libelling the government, a court, or any other aggregate body, is abolished, as inconsistent with the spirit of the constitution. It gives unqualifiedly the right of using the press for the purpose of "examining the proceedings of the legislature, or any branch of the government," and declares, that no law shall ever be made to restrain this

right. But of what avail would this privilege be, if public bodies were guarded by the rules that apply to libels against individuals by the English law? Every thing, according to that law, that tends to bring a person into contempt or disgrace, is a libel; and although the strictures are true, the guilt is not lessened, but, according to some authorities, enhanced. Therefore, every discussion of a legislative measure, or a judicial decision, which tends to show folly in the one, or injustice in the other, would be punishable as a libel; and the very end which the constitution had in view would be defeated. The restriction that every one is liable for the abuse of the liberty, clearly does not apply to any latitude of animadversion whatever upon public measures; but to the injury that may be done to private character. As to public measures, there can be no abuse of the right. It must be unrestrained, or it is no right; for you can rest the right of repression nowhere but in the hands of some public functionary; he must be guided by laws made by the legislative power; and with this power of making the rule and of interpreting the publication that is supposed to be obnoxious to it, the privilege of publishing and discussing would soon be brought within limits too narrow to be of any value, unless it was guarded by the constitutional declaration, and by laws made to give to it its full effect. Nor can the abuse of this liberty be attended with any great or permanent inconvenience; certainly with none that can be compared with that of the restraint. A false representation of legislative proceedings can have little or no effect in a country where the press is as free to correct as it is to spread it. In a country where laws are made by a numerous body, whose proceedings are in public, misrepresentation is destroyed the moment it appears, and injures no one but its weak or wicked author. The terms of a law may be grossly misrepresented. The next day it is published, and the falsehood is detected. No injury is suffered by the public; but the penalty falls on the author, who loses his credit for veracity or discernment. The reasons which led to the passage of the law,

are erroneously and falsely stated, they are ascribed to ignorance of the true interests of the country—hard at the heels of the calumny comes its refutation in the publication of the debates, and the public sustains no injury from the calumny offered to a public body in its aggregate capacity. The same reasoning applies to the judiciary, considering courts in their incorporeal capacity. The publication and the publicity of their proceedings will always correct any false representations that may be made; and the ideal beings which we personify for certain purposes, under the names of legislative and judiciary power, will suffer no more injury, will no more be brought into contempt by false and malicious accounts of their proceedings, than the other power, which we call the executive, and which it has never been thought proper to protect, independent of the persons who exercise it, by any law of libel. If, then, there be any inconvenience in permitting the widest possible range to the right of verbal or written discussion of public measures, it is one of inconsiderable amount; but the evil of imposing the least restraint is incalculable. Say that true representations shall be allowed—who will, in order to inform the people, risk any publication of the measures of their rulers? If incorrect accounts of judicial proceedings are punishable, who will venture on the task of a reporter? Publicity, that great safeguard against corruption, will be destroyed: public opinion, which, even in despotic governments, corrects abuses, will lose its force; and the law of libel, with this extent, becomes one of the most powerful engines for the overthrow of all free institutions.

But when any of the public functionaries, in either of the great branches of government, are personally attacked—when animadversions on public proceedings are made the vehicle for injury to private character—then the law protects them as it does any other individuals; and, although there can be no libel against the government, or the court, yet the legislator and the judges are not left without the same redress that is given to their fellow-citizens. The limits of this report will not permit me to

offer one-half of the reasons that present themselves to justify the suppression of this species of libel from our codes. The practical result however from them, observed in the general and state governments, is instructive. In most, if not in all of the states, libels against the government, and particularly against the judiciary branch of it, are liable to prosecution. Under the general government, since the repeal of the unconstitutional sedition law, they are not. Yet the tribunals of the United States, unprotected by any penalty, are certainly not less respected, and perform their functions with as little interruption, from the licentiousness of the press, as those of the state governments.

In most cases, the connexion between cause and effect exists between the subject of this chapter and that of a subsequent one—of Duels. Defamation, either real or supposed, is the cause of most of those combats which no laws have yet been able to suppress. If lawgivers had originally condescended to pay some attention to the passions and feelings of those for whom they were to legislate, these appeals to arms would never have usurped a power superior to the laws, but by affording no satisfaction for the wounded feelings of honour, they drove individuals to avenge all wrongs of that description, denied a place in the code of criminal law. Insults formed a title in that of honour, which claimed exclusive jurisdiction of this offence. It is too late, perhaps, to eradicate; but we may probably, by prudent provisions, lessen the evil. With this view, some have been introduced into this chapter; all of which are new in our criminal jurisprudence. By one, the court may, if the circumstances of the case render it proper, direct that the whole or any part of the punishment may be remitted, on the defendant's making such apology, or after-amends, as the court shall deem sufficient to the injured party. By another, where the jury find that the accused spoke the words, or made or published the libel, and that the charge is false, they are required specially to state that the charge is false and unfounded, and the court may, on

the demand of the prosecutor, cause such declaration to be published at the expense of the defendant. Lastly, if the defendant shall avow himself to have been the speaker of the words, or the author of the libel, and acknowledge that the charge they import is unfounded, or, in cases where there is any ambiguity, that the charge was not intended to apply to the prosecutor, the punishment shall be confined to the payment of costs and the publication of proceedings. These several provisions, by extending the legal remedy over part of the ground now exclusively occupied by the principle of honour, it is thought, may, in conjunction with the special enactments in the chapter of duels, have a tendency to check that absurd and fatal practice.

No words should be punishable, unless they are used with intent to injure, or are such as, whatever may be the real intent of the party, naturally have that tendency. But even to this there must be further restrictions, such as charges necessarily made in the prosecution of a public duty, either as a legislator, judge, advocate, or witness, and confidentially by way of advice, or called for in self defence. These and other exceptions are specially declared in the code, and they are generally taken from those English decisions which have been considered as the most consonant to the dictates of reason. A variance, however, from that law will be found in making defamation, by words spoken, as much an offence as if they were written. By the English law, although these give a right of private action, yet be they ever so malicious and injurious, be the charge which they employ ever so atrocious, they cannot be punished as an offence. For this difference it was supposed no substantial reason could be given, and it was believed also that it would lead to other serious inconveniences. The satisfaction by private suit must necessarily be of a pecuniary nature. Men, therefore, who think highly of reputation are unwilling to have theirs appreciated by that standard. They will, then, either suffer the injury to go unpunished, or they will in this, as in most other cases where no

remedy, or an inadequate one, is provided, take the law into their own hands; and it is no improbable conjecture, that a very great proportion of the many breaches of the peace, and deaths by duels, which originate in verbal provocation, might have been avoided, had an adequate satisfaction been provided by law. This distinction, however, is established, that while no action can be sustained for words spoken, unless they are false; yet, when they are deliberately written and published, with a view to injure the character, they are punishable, although they are true, unless they were used from some motive of public good or private duty. This distinction has received the sanction of the highest legal authority, and has been practised under in one or more of the states without any inconvenience. It is a correction of our present law, which forbids the truth to be given in evidence in any case of libel. If the truth were a justification in no case, one-half of the utility of the press would be destroyed. The misconduct and incapacity of those already in office, and the want of talent or character of the candidate, would be protected from exposure. If it were a justification in every case, the wanton and malicious exposure of foibles, misfortunes, or defects, might, with impunity, make the life of an individual miserable, while the anonymous author remained unknown; and would not, as in the case of the same words spoken, be restrained by the fear of personal vengeance.

The second chapter of this title provides a punishment for an offence, frequent in times of political excitement, the hanging or burning an obnoxious person in effigy, the relic of a barbarous state of society, and the proof of a ferocious disposition, fostered by these riotous proceedings, and which, unless restrained by the laws, would realize the cruel indignities of which they are the symbol. Combinations to destroy reputation by false accusations; and threats of making them for the purpose of extorting money, are the subject of the third chapter of this title. The fourth, which concludes it, relates to a mode of injuring reputation not unfrequently resorted to by the

ingenuity of malice, by publishing false writings in the name of another, tending to bring him into ridicule or contempt. The happiness of individuals, the quiet of families, and the peace of society, depend so much on the protection given by the laws to reputation, that this title is more minute in its provisions than many of the others. The innovations that have been introduced, it is believed, will be justified by a close examination of their tendency, and that no parts of the present law on the subject have been omitted or changed, but such as can be justified by the most cogent reasons.

We now come to the important title of Offences affecting the Person. And, before we examine the several acts which are made punishable under this head, it may be necessary to remark, that, instead of beginning, as is usually done, with offences of the highest degree in this class and then descending to the lowest, the order in this code is reversed, and the ascending scale has been adopted, for reasons which are not those of mere arbitrary arrangement. By beginning with the lowest injury that can be offered to the person, an assault, you lay the foundation for comprehending the definitions and descriptions of all the others, which are only aggravations, either in degree or by intent ; and having defined all the intermediate degrees between it and murder, you arrive at the simple conclusion that every homicide which is not included in any of the preceding classes of crimes, is murder : whereas, by beginning, as is usually done, at the other end of the scale, you must explain all the lower degrees which are included in that with which you begin, or your definition will not be understood. For example: if we begin with murder, we can only cause it to be comprehended by saying that it is homicide. We must then anticipate, by defining homicide ; and when we come to the circumstances and intent which distinguish murder from other homicides that are justifiable or excusable, or criminal in a less degree, we must travel on untrodden ground, which we must pass over again when we come to speak of these other kinds of homicide. But

by advancing regularly, we clear the way as we go ; and by getting a definite idea of the several kinds of homicide, ascending through the different degrees, from the slightest to the highest guilt, our march is uniform ; each definition is the foundation for that which succeeds, until we come to the last ; and we may form a clear conception of the crime of murder, by calling it such homicide as does not fall within any of the preceding classes

With this notice of the mode of classing the offences against the person, the very few observations that will be made on the details of this title will be readily understood.

Assault—the lowest injury of this kind—and battery, which usually accompanies it, do not materially vary in their definitions from those contained in the English law ; but the chapter, among other details, contains a minute enumeration of all the circumstances which will justify or excuse violence offered to the person, a matter on which it is of the highest importance that the law should be not only explicit, but well understood, by every individual in society. Where the same act may be indifferent, or a duty, or a crime, that legislation is surely imperfect which leaves anything to conjecture on such important points. Yet, however rich our present law may be in the number of decisions to elucidate this branch of personal duty, it is most woefully deficient in that order, selection, and publicity from which the people can learn its will. The code purports to remedy this evil ; to give to the most prominent and best founded of these decisions the force of positive law ; to give arrangement and order to the principles on which they are founded, and enable the citizen to know what species of violence he may resist, and in what degree ; to what he is bound to submit ; in what cases and in what degree he is, in his turn, justified in exercising it ; and to trace precisely the line which he cannot pass without incurring the penalties of the law. The different sections of this chapter mark, with a precision which it is hoped will prove sufficient, the aggravations of this offence, arising from person, place, intent and degree.

Illegal imprisonment forms the subject of the second chapter. The first section contains the detail of the different modes by which the detention, constituting this offence, may be effected, whether by assault, by actual violence, by threats, or by some natural obstacle opposed to the power of locomotion. Each of these are developed and illustrated; and the cases in which detention of the person of another may be justified are set forth in the text. A subsequent section, as in the cases of assault and battery, specifies the aggravation of the offence caused by the purpose or degree; and that species of illegal restraint of liberty, applicable only to the female sex, known by the name of abduction, is provided for and defined in the concluding section of this chapter.

The next chapter relates to an offence of the most heinous nature, whether we consider its effects on the sufferer or those with whom she may be connected. Whenever it occurs, the best feelings of our nature are roused against the brutal and ferocious perpetrator, and the detestation in which the ravisher is held, has almost universally induced legislators to increase the severity of the punishment, without considering that his chance of impunity increases in the same ratio. By our present law it is one of the few crimes punished with death. In addition to the general reasons for substituting a milder remedy, which apply to other cases, there is one which makes it peculiarly necessary in this. It is a crime in which conviction, from its nature, must for the most part depend on the testimony of a single witness; the odium attaching to its perpetrator generally supplying the deficiency of other proof. It is, of all accusations, therefore, that one in which the innocent have most to fear, and in which an irremediable punishment ought most to be avoided. But though the delinquent ought always to be kept within the reach of the pardoning power, his punishment should not be light: it is imprisonment for life. Some innovation is introduced in the definition of this crime. When the object is attained by fraud, the

consent, though apparently given, is as much wanting, in reality, as when violence is applied. Two cases, in which such fraud shall be equivalent in guilt to force, are specified : where it is obtained by the administration of soporific or other drugs, and where the perpetrator personates the husband of the sufferer. The other provisions of this chapter are generally accordant with the present law.

The destruction of human life, in its inchoate state, does not come within the definition of homicide. It, therefore, requires a special provision. This is made in the fourth chapter of this title. Whether the object be effected by external violence, or the administration of drugs internally, and whether with or without the consent of the woman, the crime is committed ; the punishment is increased if the delinquent be a physician or surgeon ; and if death is caused by the attempt, it is murder. Exceptions, however, are made of the case where the effect is produced by medical advice, with the intent of saving the life of the mother.

A great personal injury may be sustained by the swallowing or inhaling of deleterious substances. If these are maliciously administered, it constitutes a crime which forms the subject of the fifth chapter of this title, in which the punishment is graduated according to the intent and effect of the offence.

We come now to the consideration of the important title of Homicide. The first section of this chapter lays the foundation for all the others, by the definition of this act, and illustrations and explanations to remove every doubt as to the force of the different words used in such definition. The three great divisions used in our present law are retained, and homicide is considered, in the subsequent sections, as justifiable, excusable, or culpable. All of these are defined, explained, and illustrated. The rules by which they are to be distinguished are clearly laid down, and the exceptions specially noted. Homicide is justified, by the requisition of law, in cases where death is legally inflicted as a punishment, or where

it occurs in resisting an enemy in the usual mode of warfare, excluding poisoning and assassination, which terms are defined in the text. It is also permitted, and therefore justifiable, in the performance of other duties to the state. The first of these is the execution of the lawful orders of magistrates or courts. This general principle is in conformity with our existing law; but there is no part of it in which accessible and clearly intelligible rules are more wanted for the government of the citizens. They are called on by the first duties to the state to obey the orders of the magistrate, if they are legal; if they are illegal, they expose themselves to the highest penalties of the law. One mode of executing the order entitles the citizen who performs the duty to the highest praise, and the other subjects him to capital punishment. What, in one man, in relation to his condition or offence, is a duty, in another is a crime; and yet the rules by which we are to be guided through these narrow, winding paths, bordered by snares and precipices, in which a false step entangles us in ruin or sinks us to destruction; these rules are not to be found in the positive enactment of our law. A few general principles are laid down by elementary writers; numerous and sometimes contradictory practical deductions are made by decisions in particular cases; and the magistrate and the officer, as well as the citizen who is to aid them, are left at their peril to discover the law in the different volumes in which it is contained, and to reconcile the contradictory opinions and decisions of which it is composed. This defect in legislation is an obvious and fatal one. If the rules cannot be ascertained until the case arises, then no one ought to suffer for contravening them, for they are no rules. It is a solecism to call them such. If they can be established, it is a cruel and a wicked omission to neglect it. It is a tyranny to establish and not promulgate them. But rules laid down in books, which, from their language, their expense, or other circumstances, are not accessible, although they may be printed and published, are not promulgated.

The conclusion from these premises is irresistible, easily drawn, and nowise honourable to the state of our criminal jurisprudence.

An attempt is made to remedy this evil in the proposed code. Several subdivisions of this section contain, in order, first, the rules as to the order itself which is to be executed, and the magistrate from whom it emanates ; and, secondly, those which regard the person executing it, and the manner in which the duty is to be performed. To review these would be to repeat the provisions of the code, which is the less necessary as most of them are founded on principles established by the best decisions under our present law.

The next duty to the state, in the performance of which homicide may be justified, as analogous to the former, is that which arises from the opposition to rebellion, insurrection, and riot. Here again the same importance of regulation is preserved ; and in this part of the code, in which the principles are laid down, as well as in the Code of Procedure, will be found all that is necessary to guide the magistrate in giving, and those whose duty it is in executing his orders on the important subjects of arrests, self-defence, and the suppression of breaches of the peace.

But we have a duty to perform, not only to the state, in obedience to the lawful orders of its magistracy, and in resistance to its foreign and domestic enemies ; there is also another, which we owe to our families and ourselves, in the necessary defence of person or property. Here again we find the same deficiency in our existing law, that has been pointed out in the beginning of the review of this chapter ; and here again that deficiency is attempted to be supplied by the establishment of minute but intelligible and distinct rules, to designate what resistance may be offered to aggression, and to limit its extent both in nature and degree ; and with this ends the division of justifiable homicide.

The designation of that which is excusable is contained in a single and a short section. The leading

distinction between this division and that which preceded it is, that the homicides described in the first were voluntary, but are permitted on some principle of public good or private right; but in this are involuntary, but unavoidable by common prudence or care. Thus far, from the very definition of an offence, none of the acts coming within the purview of these sections can be denominated such. The next section, however, describes those acts of homicide which assume that character. When we inquire whether any particular act is an offence, this mode of classification gives us, in jurisprudence, the advantage of an operation something like the arithmetical one of proving one rule by another. To show a given act of homicide to be an offence, it must not only be brought within the definition of one of the acts of that nature which are designated as culpable, but it must be excluded from those which it is declared may be justified or excused. The eighth, and last, section of this chapter treats of these culpable homicides, and each of its six subdivisions contains the description of one of these offences, which, beginning with the lowest degree, where no culpable intention can be attributed to the offender, rise to murder in its appalling forms of assassination and parricide.

Those who are satisfied with the provisions of the English law, which knows only two degrees of culpable homicide, must be startled by the number indicated in this chapter. But it is hoped, and believed, that a little attention to the subject will show the necessity of making them. By our present, which is the English law, all culpable homicide is either manslaughter or murder. The first description embraces two kinds of offences that are evidently very different in degree. It confounds voluntary and involuntary homicide in the same name, and applies to both the same punishment. The destruction of human life by want of care, even without any design to do the smallest mischief, is certainly reprehensible; but surely, a wise lawgiver would not say that it was the same offence with that of de-

g death, under the influence of passion, passion had adequate cause in a violent or would he identify with these death gence in the doing of an unlawful act not crime. Yet, all this is done by our lence ; and this, with some other defects, l to be remedied by the system which it bstitute.

sections having taught us what homied, permitted, or excused, those described re now reviewing need no other defini-ey are such as cannot be brought within eding classes ; or, in other words, that in the description of culpable homicides cording to the preceding provisions, be sed. Next comes the designation of the of culpability. Here the first great dis- negligence and design, is marked, and es are divided into negligent and volun- different degrees of negligence mark a tention to the value of human life, and vocation, or the want of any, shows a degree of malignity in the voluntary in- so each of these require subdivisions, in e the degree of guilt, and assign its cor- lument.

lowest degree of negligent homicide is one little in its circumstances from excusable s it does differ, it must be an offence. It nicide involuntarily inflicted in the per- vful act, in which there is no apparent dinary means ; but without that care and a prudent man would take to avoid the g human life. It will be best understood his division of the section. But it may r comprehended by repeating one of the ch it is there illustrated. " When death ted by discharging fire-arms which are be loaded, without examining whether

they are so or not, it constitutes this offence. If the examination be made, and owing to some unknown cause, although loaded, they appear to be empty; or, if unknown to the person using them, they have been loaded immediately after the examination, due caution has been used, and there is no offence." A very slight punishment is annexed to this offence, and I doubted long whether, as the definition assumes the absence of any intent to injure, the horror and grief naturally caused by so fatal a consequence would not, in itself, be a sufficient punishment for the negligence; that these sensations must inflict a suffering much more severe than any the law could with justice award, cannot be questioned. But, after much hesitation, I concluded, that this consideration would not justify me in omitting to place so fatal an act of negligence in the class of offences. It would induce us totally to excuse all negligent and even many voluntary homicides. The depravity that can conquer those feelings of remorse and mental anguish, with which nature avenges the destruction of human life, is not suddenly, easily, or frequently attained. He who, yielding to sudden passion, takes the life of an adversary who has provoked him, feels the operation of this internal engine of punishment as keenly as he does who is the negligent or even the casual instrument of a similar event. Nor is even the deliberate murderer exempt; and the poets who have painted the most closely from nature have always truly represented the subsequent remorse to augment in proportion to the previous atrocity of the murder. Richard is haunted by the ghosts of his victims. Macbeth exclaims, "I scarce can think on what I've done—look on it again, I dare not," and the reason of his tiger-hearted instigator and accomplice reels under the weight of her remorse. Indeed, of the two, the homicide from sudden passion may reasonably be supposed to be endowed with keener sensations, and therefore more sensibly to feel the pang of remorse, than he does who has shown so much indifference to the life of a human being as not to take the proper precautions for its preservation.

Besides, the frequency of these accidents, as they are incorrectly called, seemed to demand some interposition of the law. At present they are considered and classed as excusable. But when they shall be stigmatized as offences ; when the voice of the law shall direct the exercise of that circumspection which prudence now in vain commands, it is believed that greater caution will be the result ; and instances are not wanting to show, that a positive inhibition, accompanied by the fear of a comparatively slight punishment, has prevented men from incurring risks and rushing on dangers of the most serious nature (a).

The next offence is negligent homicide in the second degree. It differs from the former only in the greater want of caution. It is defined as that which is involuntarily committed in the performance of a lawful act, but under circumstances, in a manner, or by means, which cause an *apparent danger* of inflicting death, without due precaution to avoid such danger. Every word of this definition that could, by the most forced construction, carry any more than one meaning, is carefully explained in the text ; and the whole is illustrated by examples, of the *crime* generally ; of the *circumstances* ; of the *apparent risk*, as applied to the *manner* of doing the act ; and to the *means* used. For all these reference is made to the text. As this is a comprehensive division, much greater latitude of discretion is given to the judge, in the apportionment of the punishment, than is usual in other parts of the code.

The concluding division under this head, of negligent homicides, relates to such offences, of this nature, as are committed in the performance of other unlawful acts. This

(a) A traveller in Prussia, during the reign of Frederick, has told us, that the cavalry reviews of that great disciplinarian were, at one time, very much embarrassed by the dragoons frequently falling from their horses, whereby many of them had their bones broken or were trampled to death. A general order made a fall punishable with thirty-nine stripes ; after which it was found that their horsemanship was so much improved, that falls became very rare.

is only to be remarked inasmuch as it graduates the penalty, according to the nature of the illegal act, in the performance of which the homicide was negligently committed.

We now come to the class of Culpable Homicides that are voluntary.

Still pursuing the same plan, of making the preceding definitions a key to those which follow, voluntary homicide is declared to be a crime in all cases where it cannot be justified or excused by any of the rules before laid down. It comprises two divisions only, manslaughter and murder. These denominations are retained from our present law; but the first, being stripped of the whole class of negligent homicides, nothing remains for it but those acts by which the life of another is taken by one who is under the influence of a sudden passion—a crime so different from that which produces the same fatal effect, after deliberation, as to call for a different name, and to merit a milder punishment. But it is still a crime; one difficult, under certain circumstances, to distinguish from murder; as fatal in its consummation, but drawing the distinction made in its favour by the law from two circumstances: some indulgence to the infirmity of our nature, when passion is excited by an adequate cause, and some reprehension for the injury that provoked the passion. The difficulty of drawing the line that separates this crime from the heinous one of murder, the high importance that it should be distinctly drawn, were felt in framing the provisions of this section. The numerous cases in the English law on this subject were studied, and all those principles drawn from them which could give precision to the rules that are laid down. Yet, after all that has or can be done to give precise limits to the definitions of crimes, which depend so much as this does on the ever-varying, and, for the most part, the inscrutable workings of the perpetrator's mind, much must be left to the discernment of the judge. But, although we cannot do all, it is our duty to do that which is practicable, and, in cases of this high importance, to leave as little as possible to discretion.

Manslaughter, then, is defined to be homicide committed voluntarily, under the immediate influence of sudden passion, arising from an adequate cause; and it is provided, that all the terms used in the definition are to be strictly construed in applying it to any particular act. Each of these terms is commented upon in the law. General rules are prescribed for deciding what species of injury shall, and what shall not, be deemed an adequate cause for the passion that causes the act; and it is supposed that the intention of the law on this important point, is so clearly expressed, as to leave to the jury only the task of deciding, in each case, whether the acts and intentions of the party bring him within its purview.

Having defined, described, and illustrated by examples, and confined within precise rules, all the other species of homicide, we are now to consider the last and highest description of this crime—murder. The particular attention of the legislature is called to the definition of this crime in the new code, and it is earnestly desired that every word of it may be weighed, and that it may be contrasted with the description of it given by our present law, and that the one may be sanctioned which is the most clear and explicit, and which requires the least reference to other sources for understanding it. By the code it is thus described: “Murder is homicide, inflicted with a premeditated design, unaccompanied by any of the circumstances which, according to the previous provisions of this chapter, do not justify, excuse, or bring it within some one of the descriptions of homicide hereinbefore defined.” This description was, as the projected code was first printed, contained in two articles. The sense was precisely the same, but the amendment consolidated and made it more concise, and was therefore preferred. If, then, a clear idea in the preceding parts of this chapter has been given of the other descriptions of homicide, there can be no difficulty in forming one of this, that is not liable to error. An act of homicide occurs. Did the circumstances justify it? Did they excuse it? Does it come within any of the descriptions of negligent homicide? Is

it manslaughter? If either of these questions be answered in the affirmative, it cannot be murder. The advantage of this mode of description over that of a simple definition is evident; for should any words, contained in that definition, be liable to misconstruction, an act, properly coming within the lower degree of that offence, might be brought within the definition of the higher. The act of taking human life is the same in all. The attention should, therefore, if we mean to avoid error, be drawn to all the circumstances that would bring the act into a lower degree of offence, before we inflict on it the punishment due to the highest; and the law should be so framed as to oblige those who administer it to make this examination. By the new code, no jury can convict—no judge can condemn for murder, until they have carefully examined all the lighter shades of homicide, and are convinced that the circumstances of the case do not bring the accused within any of them. The form of the law imposes this obligation. It cannot be dispensed with; for there is no other description of the crime of murder than that it is homicide that is not one of those before described. Now take the English description of the same crime, and see whether the same result is produced. Coke's description of the crime is the one most generally sanctioned by decisions and commentators. It is this: "when a person of sound memory and discretion unlawfully killeth any reasonable creature, in being, and under the king's peace, with malice aforethought, either express or implied" (a). Now suppose a jury empannelled to try an indictment for murder, and after the circumstances of the case have been detailed by the evidence, this description is read to them, and they are directed by the court, under the sanction of their oaths, to apply it to the case. There is scarcely a word in it that, to a conscientious man, will not afford matter for serious doubt. The perpetrator must have been of *sound memory and understanding*. What a scope does this give for equivo-

cation ! What a field does it open for inquiry ! What has the soundness of memory to do with the act ? Be the faculty ever so imperfect, how does it affect the guilt ? And as to discretion, if a sound discretion were necessary to constitute guilt, no one could be guilty ; for surely he commits the highest indiscretion who takes the life of another, and exposes his own to consequences of detection and punishment. The killing must be also *unlawful*. Here we have one of the features of the description contained in the code, but without the faculty which it affords of determining, by a reference to a few preceding pages, whether the killing be lawful. The person killed, to constitute the crime, must be a *reasonable* creature. Neither a newborn infant, nor an idiot, nor a madman, nor one suffering in the delirium of a fever, or stupified by opium or liquor, comes within this part of this description according to the plain meaning of the words. Again, who is in the *king's peace* ? What is *malice aforethought* ? Is there any malice that is after thought ? What is *express malice* ? When shall it be *implied* ? Thus we find that there is scarcely a word in the description of a crime so important to be known, that will not raise at least a doubt in the mind of a man of common understanding ; and it would be difficult, perhaps, to prove any description of the crime, which would sufficiently give us to understand its precise meaning, without a reference to the definitions of those homicides which were not included in it. I am certainly aware that most of these terms have been expounded by commentators and illustrated by decisions, and that a recourse to these sources of information would teach us what construction the best lawyers and judges have put upon them ; but still the evil recurs. There is no source to which we can look for the absolute certainty on which the conscience of a juror ought to rest, who is sworn to decide, and the definition given to him as the text of the law : he has a right to put the construction which his understanding adopts, upon the doubtful words ; and there are cases, too, in which the expositors to whom he is directed, are not themselves agreed, more

particularly in what respects the construction of malice, express or implied—the great pivot on which this definition turns—and one of which it is so difficult to form a definite idea, that I have purposely excluded it from the description of this offence in the code.

I may be deceived, but if I am not more so on this than on any other provision in the work, the law on the subject of homicides, in their various grades, from innocence up to the deepest guilt, is rendered by the code more clear, more consonant to reason, and more susceptible of easy execution, than it is as it now stands.

Our present law knows but one grade of murder. Yet there are evident aggravations which ought to be marked by a discreet legislature. Four have been adopted in the code that is presented to you.

INFANTICIDE, the first grade above that of common murder, is distinguished by its disregard, not only to the feelings of humanity, but of nature; but, on the other hand, its atrocity is so much lessened, by the deep and powerful sense of shame which usually prompts it, that I doubted some time whether it should form a separate class. It, however, after due consideration, seemed properly to occupy a place between that kind of voluntary and culpable homicide, committed under circumstances that would not reduce it strictly to manslaughter, but caused by some provocation, yet distinguishing it from the deeper guilt of ASSASSINATION, which is the next grade.

This characteristic is applied to murderers, from considerations drawn from the purpose of the act, the means by which it was accomplished, or the condition of the person suffering by the crime. The purpose gives it this name when it is committed in order to effect another crime, or to conceal one previously committed, when its object is to obtain an inheritance, or when a reward is given and taken for its commission. The means characterize murder as assassination when it is perpetrated by lying in wait, by arson, by poison. The condition of the person murdered, and his actual situation, also raise the

guilt into that of assassination, under the following circumstances : when the sufferer is a woman ; a man above the age of seventy ; a minor under the age of sixteen ; a person in a dwelling-house at night , asleep any where, or travelling on the high-road. All these situations and conditions imply helplessness and security. They add cowardice and treachery to the guilt which invades them, and therefore rank it in this grade of crime.

But if these cases of implied security and protection demand the severe animadversion of the law, in a much higher degree does that of express trust and confidence, and positive treachery. I have, therefore, incorporated as a third class of aggravated murder that known to the Scottish law by the express name of MURDER UNDER TRUST, and have described it as "that which is committed by persons standing in the following relation to the party murdered, that is to say : husband, wife, tutor or curator, ward, collateral relations within the second degree inclusive, master, servant, schoolmaster, host, guest, physician or surgeon ; and finally, if the murder be committed by one upon another who has reposed confidence of safety in him, on an express or implied promise of fidelity or protection Murder committed by a guide or conductor on the land, or by the master of a vessel by water, upon a traveller whom he has undertaken to conduct, are examples of this last description of murder under trust." The code, in this as in other cases, contains articles explanatory of all the words used that might be understood in more than one sense.

PARRICIDE is the last species of murder. The English law, while it punishes the murder of a master by a servant, as a species of treason, expresses by no mark of particular abhorrence that of a father by his son. Solon, it is said, thought it too atrocious to be supposed possible, and therefore omitted the mention of it in his code. Modern times afford too many proofs of its recurrence to justify the same expressive silence with respect to it.

The punishment for murder, unaggravated by any of

the circumstances which bring it within either of the denominations above mentioned, is imprisonment for life. The Code of Prison Discipline contains the increased privations and aggravations of punishment that are applied to higher degrees of this crime.

Suicide does not enter into the catalogue of offences, for the reasons offered in the Report on the Plan of a Penal Code^(a); but a penalty is provided to operate upon those who aid the unhappy sufferer in committing this act of desperation, or who, having the power, do not prevent its execution.

This title could not conclude without a chapter in relation to duels; that practice which, in modern times, seems to have proved how inefficient are all laws when opposed to public opinion, and to what degree the fear of shame will prevail over that of punishment.

In the whole scope of criminal legislation there is no subject which presents greater difficulties. Severe penalties have been denounced against it in vain; and it is the more difficult to be eradicated, because it prevails most where courage, a fear of disgrace, and a sense of personal dignity, are most perfect.

One cause of this disorder in society has been anticipated in that part of this report which treats of injuries to reputation. Where the law gives no such relief as ought to satisfy those who conceive themselves disgraced by imputations on their honour or integrity, as long as honour and integrity are necessary to happiness in society, human passions will endeavour to supply the deficiencies of the law. But the law, as it now stands, gives a partial remedy in those cases of defamation only which imply a want of integrity or impute the commission of a gross crime; and we accordingly find that redress is sought by an application to the laws for injuries of that nature more frequently than by appeals to arms; while the charge of mendacity, or of a deficiency in the courtesies of life, are more frequent causes

of duels than imputations of serious crimes. Why is this? It is because the law gives some relief in the one case—none in the other. One part of the remedy provided by the code is suggested by this consideration. The other is drawn from the motive that leads to the offence. this is, in most cases, a desire to possess that degree of standing in society which raises the possessor in the esteem of his fellow-citizens, and gives him a right to expect those distinctions and offices to which his talents may entitle him.

If, then, we can procure an adequate remedy by law for injuries to reputation, and make an exclusion from office and civil distinction the consequence of any attempt to usurp the functions of the law · if, by proper penalties, we give to those who reluctantly aid in encounters of this nature a good pretext for refusing their co operation, while we take away that which the law now affords them, for refusing to give evidence against their principals, we shall do much to lessen the frequency of this practice, and, by giving a turn to public opinion, in time, to extirpate it.

Beginning at the source of the evil, the first provision of the chapter is to make it punishable to use insulting words, or to make an assault with the intent either of provoking a challenge or disgracing the party if he should not give it; and in order that a prosecution, for such an offence, may be made the means of producing an honourable satisfaction, the next article provides, that if the defendant shall make any denial, explanation, or acknowledgment, which, in the opinion of the court, ought to satisfy the honour of the prosecutor, they shall direct the same to be published, with their opinion, declaring it to be satisfactory, and dismiss the defendant; and where no such acknowledgment is made before judgment, it shall, if given against the defendant, contain a clause that it shall be void as to all but costs, in case the defendant shall make such acknowledgment as shall be satisfactory to the prosecutor; and in any prosecution under this article, if the offence be a charge affecting the

honour or reputation of the person making the complaint, and the proof on the trial show such charge to be unfounded, the court shall make that declaration in the sentence, and cause it to be published at the expense of the defendant, and the truth of such charge shall, if the prosecutor desire it, be tried by the jury.

These provisions are entirely new. They give, what the law has hitherto denied, satisfaction for those species of insults which most commonly lead to duels, and satisfaction of a species that the most chivalrous need not blush to seek or to receive; and insomuch, they are calculated to prevent those fatal encounters which few, if any, of those who engage in them, would not avoid, if any other mode were provided by which they could escape disgrace. If, however, the parties refuse this remedy for their wrongs, and give or accept a challenge to fight a duel, although it should not take place, the penalty is imprisonment in close custody from two to six months, and a suspension of political rights for four years; if the duel take place, the penalty is increased by a longer period of imprisonment, and a protracted suspension of rights both civil and political, in proportion to the injury resulting from such conflict; if it result in death, the imprisonment is extended to four years; and all political rights, and the civil rights of the first and third class, are forfeited for ever. If the wound which produces death is inflicted by treachery, it is declared to be murder by assassination. The treachery intended by this provision is defined to be the breach of any rules made for conducting the combat, or by taking any other advantage that could not be supposed to have been intended to be given; and whatever may have been the rules agreed upon, it is declared to be assassination, if the mortal wound be given after the party is disarmed, or otherwise incapable of resistance; or, if the party inflicting the mortal wound have obtained the power of doing it without risk to himself, by the effect of a chance previously agreed upon. These two last provisions are intended to put an end to a ferocious practice sometimes

resorted to in duels, which it is thought may be done, as much by stigmatizing them by the designation of treachery and assassination, as by the severe punishment assigned to them, which punishment there will, in such cases, be no disposition in the prejudices of jurors to avoid inflicting. However imperative we may make the language of the law, it loses its force when it includes in the same prohibition, by the same name, and under the same penalty, acts different in their motives, circumstances and effects. We may, in our statutes, give the name of murder to death occasioned by a duel; but the world will not adopt the appellation; and a combat, sanctioned by the irresistible command of public opinion, and marked by no circumstances of peculiar malignity, will never be considered, prosecuted or punished, as an assassination. If you wish to have it punished at all, it must be by its own name, and a proportionate punishment, nor must that be an infamous one. Put what is called a fair duellist on a footing with a thief or a murderer, and you assure his impunity. Consign him to a temporary, close, but not degrading imprisonment, take away from him all hope of political preferment; and seeing that his conviction and its consequences cannot be escaped, he will gladly avail himself of the opportunity offered by the laws, of throwing off, without disgrace, the tyranny of custom; for there is this peculiarity in the offence of which we now speak, that nine times in ten it is most reluctantly committed by all who are parties to it. Let the severe punishment, then, be reserved for treachery and ferocity; inflict a mild penalty on duels fairly conducted; punish the insults which lead to them, and you will insure the execution of the law, furnish a fair excuse for even the most high-minded to avoid incurring the disadvantages which it creates, and you will do more than has been yet done to abolish this barbarous, unequal and unjust mode of settling private quarrels.

If prosecuting officers had always used the same diligence in bringing duellists to justice that they have

shown in the case of other offenders against the laws, although the accused might escape the severe penalties of the law from the lenity of jurors, yet the risk, inconvenience, solicitude and expense of the trial, would deter many, particularly those who had aided as witnesses or seconds, but there seems to be a general tacit consent, on the part of the magistrates, attorneys for the state, and grand jurors, that there is something dishonourable in such prosecutions, and that they form an exception to the oath of office, and are not to be prosecuted, unless on the most direct application, and on producing the fullest proof. How else shall we account for the open, notorious, flagrant breaches of the law so frequently taking place almost in the presence of the magistrate, the grand jurors, and the prosecuting officer, without any instance of prosecution. To remedy this evil, the code provides, that the attorney-general and district attorneys shall make a declaration on oath, and also make an honorary declaration, that they consider the execution of laws against duelling as forming no exception to their duty of carrying the laws into effect; and that they will, by all lawful means, prevent any intended duel which comes to their knowledge, and prosecute all offences against that part of the code. Still further to prevent this offence, no person elected or appointed to any office, civil or military, judicial or executive, shall exercise the same, unless he shall declare, on oath, that he has not and will not commit any of the offences described in this chapter. I was not unapprized when these provisions were recommended, that this expedient had been partially resorted to in some of the states, and that it had not been deemed a proper remedy. But I apprehend that, in the cases where it has appeared to fail, it was not fully or fairly tried; and I have from the first authority that in one state, at least, it had proved so nearly effectual as to render duels extremely rare where they had formerly prevailed to a most alarming degree. In a letter with which I have been favoured by the chief justice of the United States, he says: "On the subject of duelling

some contrariety of opinion prevails. I am among those who think that the utmost wisdom is required, and ought to be exerted, for its prevention. Originating in a sense of honour, the passion from which it springs must be consulted, if we hope to suppress it. We must array ambition against this false honour, as its only equal competitor in a young and ardent mind. The privation of political rights which you propose is, I think, particularly adapted to this offence. The efficacy, as in most other cases, depends on the certainty that the law will be executed. Were you to rely on public convictions alone, this certainty would not exist. Even where death ensues, prosecutions will not always be instituted. When it does not ensue, still more where the duel does not take place, the whole affair will generally be overlooked ; and challenges will not be completely restrained. The oath you require from every person appointed or elected to any office whatever, before he can enter upon its duties, is, I believe, the best, if not the only measure, which human wisdom can devise. Its efficacy has been proved in Virginia, where a similar oath is prescribed and has been rigidly exacted. The consequence is that duelling, formerly so common, is now scarcely known in this state, and public opinion on the subject is very much changed." This high authority, supported, as it always is, by irrefragable argument for the doctrines stamped with its approbation, has confirmed me in the purpose of retaining in the code which is submitted to you the provisions I have detailed. The same false sentiment of honour which leads to a breach of the laws in committing this offence, renders its punishment more difficult. Witnesses avail themselves of the principle that they cannot be compelled to justify anything that may inculcate themselves ; and, therefore, neither seconds, nor surgeons, nor any others who were voluntarily present, can be induced to testify ; so that facts notorious to the world, published in every newspaper, which must be known and understood in order to exonerate the parties from the foul crime of assassination, and which, therefore, they

cannot wish to keep secret, can rarely be proved before a court of justice. In order to obviate this, in another part of the system it is provided that those who have served as seconds in a duel, or witnessed one as surgeons, shall be forced to give testimony against the principals, and that no person so examined shall be himself punishable for the offence. This, together with the forfeiture of political and civil rights incurred by the second, if he be convicted, will make it extremely difficult for principals to obtain friends to attend them to the field; and the dishonourable as well as dangerous suspicions that must attach to the survivor, in a duel without witnesses, will generally prove an insurmountable obstacle to such encounters.

The frequency of this offence in our state, the many valuable lives which have been sacrificed to this false point of honour, the distress with which it has overwhelmed whole families, and the particular ferocity which of late years the practice has assumed, all justify the attention of the legislature, and call for its special interference; not in the shape of severe penalties; not by denouncing punishments which are never inflicted: but by preventive remedies; by mild laws, so framed as to secure their execution; and by taking away, in most cases, the pretext for private vengeance which was offered by the deficiencies of public justice.

The twentieth title, "Of offences affecting individuals in their profession or trade," contains only a reference to other parts of the code, in which offences, under that description, were necessarily noticed; it being found impossible, without repetition, or anticipating on other provisions, to arrange these under a separate head.

The condition of individuals, or that relation in which nature and the institutions of society have placed them with respect to each other, is the source of rights as well as of other enjoyments which ought to be protected by law. Our present laws afford this protection but imperfectly in some instances, and totally deny it in others. The substitution of one infant for another at such a

tender age as renders the exchange and the deceit practicable in the absence of the parent, the production of a pretended child for the purpose of intercepting an inheritance, are not offences by our present law, yet the jurisprudence of all nations gives us examples of these deceptions. The destruction or falsification of registers of births, marriages and deaths, for the purpose of injuring the condition of another, is also made punishable by proper penalties. The common practice of exposing infants was thought to be not improperly ranged under this head; for although it is certainly an injury to the person, and as such might have been classed in that division, yet the principal injury is that offered to his condition, by causing him to lose the advantages of the relation in which he would have been placed as the child of his parents.

The conditions arising from the important relation of husband and wife may be affected in the most cruel and injurious manner, by contracting a second marriage during the existence of a former connexion of the same kind. While the civil law pronounces the last marriage void, the penal law cannot but add the sanction of a heavy punishment to a fraudulent act, which disappoints the hopes of domestic happiness, deprives the offspring of the first union of a parent's care, and devotes those of the second to unmerited reproach, and all the other evils of illegitimacy. Our present law is not silent on this last offence; but the statute wants precision, and one of the exceptions would seem by its language to give the means of evading its penalties without much difficulty; for it declares they shall not attach to any one whose husband or wife shall have absented him or herself from the other for five years, "the one of them (that is, the husband or wife) not knowing the other to be living within that time." So that, if the offending can only keep the injured party in ignorance of his existence for five years, he may contract a second marriage with impunity. Besides correcting this inaccuracy, by restricting the exception to the innocent party, the nine-

teenth title contains many other articles to prevent the evasion of the law, and to clear up doubts in a matter so important to the peace of families and the good order of society.

We have now come to the consideration of a class more numerous and more difficult to repress than any in the catalogue of offences : those affecting property ; which word is here used precisely in the sense given to it in the Book of Definitions : that is to say, that it conveys a compound idea, composed of that which is the subject of property and the right to be exercised over it. In relation to its object, property is either corporeal or incorporeal ; and the right to be exercised over it is that of possessing and using it with respect to that which is corporeal, and of enforcing and transferring it with respect to that which is incorporeal. Consequently, the injuries treated of in this title, are acts which interfere with the exercise of the right, which may be done either by destroying or injuring the thing which is the object of property, or by removing it from the possession of the owner, and appropriating it. On this distinction is founded the division of these offences, into malicious injuries to property, and fraudulent appropriations of it.

1. In the former, the term malicious is intended to exclude negligent or unintentional injuries, which are left, when the case requires it, to the operation of the civil law.

The most common, as well as the most dangerous offence of this nature, is that called arson by our present law, which imposes the penalty of imprisonment for life on the burning of certain enumerated buildings, and seven years at hard labour for the burning of any other building. In the new code the severest punishment for this offence is fourteen years' penitentiary imprisonment, and this is restricted to the burning of a dwelling-house, a distinction between it and other buildings not inhabited being obviously proper. The destruction of other buildings is made punishable by penalties proportioned to their value ; and the chapter contains provisions

for the protection of all property, real or personal, against every species of malicious mischief. All the terms used are defined; the defect in our present law, which punishes no other injury of this kind to property but by burning, is supplied; and two articles are added which provide for other important omissions; the one, the malicious destruction of title-deeds or evidences of property; the other, the removal or destruction of landmarks.

A second chapter provides for a case analogous to those mentioned in the one that precedes it. This is the invasion of property by housebreaking, which is defined to be the entry into a house secretly, or by force, or threats, or fraud, during the night, or entry by day and concealment until night, with the intent of committing a crime. As this is a distinct offence from that of appropriating property after the house has been so entered, and is completed by the entry itself with the intent to commit any species of crime, whether against person or property, it occupies a kind of middle ground between malicious injury to property and the next division, a fraudulent appropriation of it.

2. In this division, it is believed that several valuable improvements have been introduced, both in the arrangement and the manner. It is arranged under six heads, and treated of in as many different sections.

The first is the fraudulent appropriation of personal property, which had been delivered to the offender for another purpose. This section, by several precise articles, is calculated to avoid the uncertainty that has prevailed with respect to constructive thefts, and by providing an adequate punishment, which was totally wanting, for fraudulent breaches of trust, to assign to each of these offences its appropriate penalty and character.

The second section provides for a case that is now either always confounded with theft, or considered as not coming within the scope of any penal law. I mean the fraudulent appropriation of property found. Whatever, in strict morality, may be the character of such act, it is

clearly less in degree of guilt than theft ; while, at the same time, the injury to the owner, and the knowledge which the finder must have that the property is not his, ought to rank it as an offence, though one deserving a lighter punishment.

A third section relates to the violation of epistolary correspondence, an act not punishable by our present law ; but one which, whether we consider the want of principle that must produce it, or the injury it is calculated to do, ought to be repressed by the sanction of the law. The unauthorised opening and reading of a sealed letter ; the publication of such letter so improperly opened ; the taking of a letter from another without his consent, whether sealed or not, and the malicious publication thereof, are severally declared to be offences, and are made punishable by fine and imprisonment. The sanctity of private correspondence, and of the confidential communications of friendship, have been too often violated by party spirit or unprincipled treachery, in our day, to require any argument to show why this section has been deemed necessary.

The two next sections are of high importance in this general division of offences ; and the attention of the legislature is particularly invited to their provisions. They relate to two offences that are frequently confounded, but which are here endeavoured to be distinguished by definitions and rules which are minute, and it is hoped, will be found to be intelligible and precise. These offences are, the obtaining of property by false pretences, and theft, properly so called. The uncertainty of the English law on this subject was lamented by Lord Hale ; and the multiplicity of decisions, since his time, have rather rendered it more obscure. That great lawyer says : " It is the mind which maketh the taking of another's goods to be felony or a bare trespass only ; but because the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, the same must be left to the due

and attentive consideration of the judges and jury ; whence the best rule is, in doubtful matters, rather to incline to acquittal than to conviction" (a). These *doubtful matters* alluded to in his lordship's opinion, might, it was thought, be much diminished in number, and, of course, the conviction of guilt and the acquittal of innocence rendered more certain, by adopting precise definitions, drawing practical deductions from them, and elucidating the whole by examples. It has been my endeavour to do this ; with what success can only be determined by a close examination of the text. Simple theft being sufficiently described, and the danger of confounding it with other fraudulent appropriations of property avoided, the next consideration is the different aggravations of which it is susceptible. These form the subjects of the three following sections.

The first of these is theft by effraction. This differs from the crime known by the name of burglary, by our present law, in this, that it is committed by breaking into a house by day, or by actually committing the theft therein without breaking ; whereas burglary can only be committed by a nocturnal effraction, and is complete by the intent of entering, in which it more resembles the offence which has hereinbefore been described as house-breaking. Stealing by an entry, without effraction, is punished by a mitigated penalty ; but the crime and the punishment are aggravated by the circumstances of actual violence to any person who may resist the offender, or of preventing such resistance by threats. There is an error of the press in placing in this section the two last articles, respecting wrecked property. They properly belong to the section which treats of the fraudulent appropriation of property found.

The next aggravation is that of privately stealing from the person, which I have been induced to place in a separate grade of crime, principally from the consideration that it is one which cannot well be committed, to

(a) Hale's P. C., p. 509

any extent, without a dexterity acquired only by long practice and instruction; and also from the difficulty of guarding against the depredations of its exercise.

The last aggravated theft, which it has been deemed proper to notice, is robbery, which is "theft committed by fraudulently taking the property of another from his person, or in his presence, with his knowledge and against his will; whether it be taken by force, or delivered, or suffered to be taken through fear of some illegal injury to person, property, or reputation, that is threatened by the robber or his accomplice."

The description of these last two offences is so nearly similar to those contained in the English law, as to require no elucidation; nor does any seem necessary for that treated of in the concluding section, namely, receiving property knowing it to be stolen. But, although the English law has been made the ground-work of these and other provisions, it is not meant to allege that the rules of that jurisprudence have been strictly followed, except where they have been found to coincide, as they for the most part do, with those of justice.

The fourth chapter of this title defines an offence of no unfrequent occurrence in England, and which, it was thought, should be guarded against here; that of attempting to obtain property or other advantage by such threats, either of injury to person, reputation or property, as do not amount to robbery, according to the definition of that offence contained in this code. The offence chiefly intended to be guarded against by this chapter, is that of sending threatening messages or letters, either to obtain property, or procure service, or merely to alarm.

The last chapter of this book contains a description of offences which it was found impossible to bring within any one division of the code, because it might affect as well the person, the reputation, the property, or the profession or trade of individuals. To have treated conspiracy as a separate offence, under each of these titles, would but have led to a tiresome and useless repetition. It was, therefore, determined to annex it to the whole as a

concluding chapter. It is there defined as an agreement, between two or more persons, to do any unlawful act, or any of those acts designated in the law, which become, by the combination, injurious to others. Those are further explained to be, agreements to commit offences; to accuse and prosecute falsely; to do certain enumerated injuries that are not offences when done by an individual. The object of the first two of these combinations needs no explanation. The offence is the act of combining to do them. If the completion of the design were made necessary to constitute the offence, the evil would, in many cases, be without remedy. The agreement between two or more persons is an act which shows a settled design; and is clearly distinguishable from an intent formed in the mind of an individual, not only because of its being more susceptible of proof, but also from the circumstances, that, if the original design of the individual could be made to appear, a change of purpose might have taken place, of which no evidence could be given; whereas, a combination between two or more must have been communicated by some outward acts, and the renunciation of the project evidenced in the same way; both being susceptible of proof. A combination too, although discovered before execution, is injurious, because it excites alarm in the person who was the object of it, and a sense of danger and suspicion in the whole community, which the most determined but secret intention of an individual could never do. The danger is also increased by the character of the injury to be effected by these combinations; they being, for the most part, such as individual malignity alone could not accomplish. For these reasons agreements to do certain acts, although never carried into execution, are, in this and other parts of the code, made punishable as offences.

The third head under which conspiracy is made an offence, although the act agreed to be done would not be an offence, without such previous agreement, requires more elucidation. Its object is to prevent combinations injurious to trade, by raising or depressing wages. This

subject is one that has engaged some attention lately in England, where the laws, as they now stand, prohibit combinations among workmen for raising their wages, but do not consider, as an offence, a similar agreement among employers to lower them. To impose as few restraints as possible upon the liberty of action, is undoubtedly a sound rule, in that part of legislation which may operate upon political economy; and therefore it might, on a superficial view, seem that any regulation, as to the conduct of those concerned in manufactures and trade, in relation to the price they may choose to put on their own labour, or give for that of others, would be contrary to this rule. But the law interposes here, not to impose a restriction, but to prevent one from being imposed by an incompetent authority. Every labourer has a right to refuse his services, unless the price which he appreciates them at, be that price ever so extravagant, be paid. Every employer has the right to refuse the same service unless the price be reduced to the sum he thinks it worth. But whenever an agreement takes place among the class of employers or labourers, for regulating these prices, then such an agreement becomes, to the extent to which it can be enforced, a law operating for the reduction or advance of wages, and a law made by parties interested in the imposition of it; and, therefore, necessarily unjust; and which, if permitted, would be, in effect, a usurpation of the powers of legislation, and an unwise and oppressive exercise of them; for, although an agreement be only a law to those who are parties to it, yet, when the object of it is to affect the interest of others in a way in which they would not be affected but for such agreement, it is in its operation, although it may not be in its form, a law operating, though not binding, upon those who are not parties to, but objects of the agreement. Suppose a law instead of an agreement, and that a statute should render it unlawful in any employer to give more than a certain price to his labourers, the effect upon this last class would be precisely the same; yet such a law would be acknowledged to be one at variance with the principles of free

exertion, free use of capital, and free competition. The agreement, therefore, is hostile to these principles, and ought not to be permitted. For these reasons the code, in conformity with the English law, imposes a penalty on any two or more persons conspiring to raise the price of wages; but it adds to that provision one which is wanting in the English statute, imposing a similar penalty on a combination between employers to reduce the price of labour. Without this the law would be partial and unjust in its operation. Employers in any one branch of manufacture, being, comparatively to the operators, few in number, an agreement between them is more easily made; more readily enforced among themselves; and, while their wealth enables them to wait the effect of their combination, the poverty of those against whom it is directed obliges them soon to yield to the dictates of their employers, be they ever so oppressive. This inequality in the effects of this offence, between these two classes of men upon whom it reciprocally operates, requires a correspondent difference in the punishment; and it is, therefore, directed that imprisonment shall always be part of the sentence against employers for a combination to lower the rate of wages, for this cogent reason, that the highest limit which could be given to the fine upon the labourer would be no punishment to his wealthy employer who should be guilty of the same offence. It is also provided, that an agreement to require a longer time to labour in the day, or to decrease the number of working hours, without altering the price, shall be considered as a combination to lower or raise the rate of wages; and if the agreement be to inflict any injury on those who will not become parties to it, the punishment is to be doubled. Other articles are contained in the text, calculated to explain and carry into effect those which have been commented on, and to guard against abuses in enforcing them.

The rapid view I have thought it necessary to take of this important branch of the work committed to me is

now finished. Some comments and arguments that, perhaps, ought to have formed a part of it, have been doubtless omitted. They will readily be supplied by the intelligence of the body to whom it is submitted; but I much fear that the reproach of having unreasonably trespassed on their attention may have been more justly incurred. Yet nothing has been advanced which was not thought necessary to the elucidation of the great variety of provisions contained in this code, and much was designedly left to be supplied by reflection.

INTRODUCTORY REPORT

to

THE CODE OF PROCEDURE.

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I HAVE now the honour to present the second of those codes which your law has directed me to prepare. The legislature which passed that law, were aware that no system would be complete without a Code of Procedure. Expense, delay or uncertainty, in applying the best laws for the prohibition of offences, would render those laws useless or oppressive. Therefore, this division has been considered of equal importance with any of the others, but more extensive in its operation than either of them. The party committing the offence and the individual injured, rarely the whole community, are the only persons immediately affected by the commission and punishment of a crime. But in the measures prescribed for preventing or prosecuting them, every citizen, however unconnected with the offence, may find himself involved. As a judge, a magistrate, a civil or military officer, or even a private citizen, every one is liable to become an active party in the task of applying the law, after a breach of its provisions has taken place, in preventing the commission of a crime, or in arresting the progress of such as are continuous in their nature. The rules which direct us in what manner, under what circumstances, and to what extent we may use force to protect our own persons and property, or those of another, against unlawful violence, also belong to this division of the law ; so that its provisions are more required for daily use than those of any other part of the system ; and it may, therefore, without impropriety,

be said, that a society, however excellent may be its laws for defining crimes and affixing to them proper punishments, will, if the means of carrying them into effect are expensive, dilatory and uncertain, be worse governed than the community in which the Code of Crimes and Punishments is faulty, but where the rules for executing it, and for preventing and arresting the progress of offences, are easy, cheap, expeditious and just. More attention, therefore, has been paid to this branch of the subject than the little importance, commonly attached to it, would seem to warrant. None of the codes which have come within my knowledge, either ancient or modern, except the French, contain any separate body of laws directing the mode of procedure, either for arrest, trial, punishment or prevention. Our laws, as we have seen, are wofully defective in this particular; giving for acts, which, by some laws, are declared to be offences, no rule whatever; and for the others, referring us to the English common law, unmodified by statute. The necessity, therefore, of a Code of Procedure was much more urgent than that which existed for a Code of Crimes and Punishments. The system adopted in the prosecution of certain offences, by the legislature, and in that of others by the courts, with the modifications introduced by our statutes, is freed from many of the abuses and oppressions to which criminal prosecutions in England are liable: a public officer being appointed to prosecute, the individual who has suffered by the crime, is not, in addition to his loss, put to the expense of bringing the offender to justice: jurors being taken by lot, no improper influence can be exerted in the arrangement of the panel: the assistance of counsel being secured in all cases, the defendant, no matter of what he is accused, is enabled to make his full defence: and the intervention of a grand jury being rendered necessary in every case of a grave accusation, the individual is not exposed to vexatious prosecutions that can materially affect him. Standing mute is considered as a denial, not a confession. Appeals of murder, trials by battle, and many other oppressive and absurd parts of the ancient

common law, have never been used in our state. Yet, with all these comparative advantages, our practice requires reform.

First, because the exemption from several of these and other inconveniences is, in many instances, not secured by law; and, in others, is given to us by the construction of the court, contrary to law. In the Introductory Report to the System of Penal Law, it has been shown, that where the common law of England is prescribed as the law of our procedure, it is spoken of without any of the amendments introduced by the English statutes; and that in all acts, which are created offences since 1805, no mode of procedure whatever has been provided.

Secondly, because, if the present mode of procedure were sanctioned by law, it would require alterations and additions in the several particulars in which they have been introduced in the code, some of which will be hereinafter pointed out, with the reasons for introducing them.

Thirdly, because of the difficulty, expense and inconvenience, before enlarged upon, of referring to foreign laws, written in a language which a majority of our citizens do not understand.

Fourthly, because of the uncertainty inseparable from laws depending for their authority upon judicial decisions.

Fifthly, as incident to the two last, because of the ease, convenience, and indeed necessity, for all those who wish to perform their duty as good citizens, of finding in one book, couched in language easily understood, and arranged in a method making them easily accessible to all, the rules necessary to direct them in all the cases in which self-defence, the prevention of crime, the arrest of offenders, and their high duties as magistrates or jurors are involved.

The Code of Procedure now offered, sets out, as that of Crimes and Punishments does, with an introductory chapter containing a brief exposition of the objects which it is intended to effect. To this enunciation I have heard no objection stated, and its utility has been acknowledged by many of those statesmen and jurists to whom the plan has been submitted; it has, therefore, been retained.

The first of these objects, in order, as well as in importance, is the prevention of intended offences. This may be effected by personal resistance. The cases in which resistance is lawful, the degree to which it may be carried, under what circumstances the interference of private individuals is permitted, when the sanction of a magistrate is required, his right to command the assistance of others, and when he may require the aid of military force, together with the formalities required for effecting these objects, are set forth in the first book.

According to our present jurisprudence, there is either no written law for our direction on these points, which it is so much our interest, as parties, magistrates, or citizens, to know, or it is so dispersed in different books, so uncertain when it is found, and of such doubtful authority, as to render it unsafe for any one to trust to his own opinion, or, in truth, in many cases, to that of others. Yet the occasions which call for the exercise of these rights and duties, are those of all others in which there is least time to reflect, or opportunity to consult. For this reason, every man ought to be provided with the means of acquiring so much knowledge on these points as is necessary for daily use. Without it, he will neither know how to protect himself, or pay these duties, which he may be urgently called on to perform in the protection of others. He must either act at his peril, submit to injuries which he has a right to repel, or depend on the purchased opinions, and sometimes the "forked counsel," of men who disgrace an honourable profession.

The first dictates of common sense inform an individual that he has a right to defend himself. The laws of society impose the obligation upon him of defending others, and of enforcing the execution of the laws. Magistrates and executive officers are required by official duty to prevent or arrest violence and depredation; and the military force is told, that it must assist the civil power when legally called on. All this the general language of the law gives the citizen to understand. But in our state it has never designed to make such a record of its will as may enable any one, desirous of obeying, to discover boundaries be-

tween legal acts and transgression in the performance of this duty. A correct moral sense, a determination to injure no one, may, with respect to a man's own actions, render a knowledge of positive law less necessary ; but no prudence can foresee or prevent the necessity of self-defence, and every man may be called on in some capacity to protect others or to defend the peace of the state ; and yet with every inclination to perform the duties of a good citizen on these occasions, he is continually arrested by the unavoidable doubts which must arise as to the propriety of personal exertion in the particular case, or the extent to which he may carry it. On the vital subject of calling in the military to the aid of the civil powers, there is absolutely no provision ; and there is no power liable to a more dangerous abuse. Sometimes necessary for the defence of the constitution and the enforcement of the laws, it is at the same time the weapon best adapted for their subversion. The circumstances, therefore, in which its use is permitted, and the mode of its exercise, ought to be impressed on the mind of every citizen, to prevent his refusing his aid when it is legally required on the one hand, and of his being made the instrument of his own oppression on the other. It is attempted, in the first book of the code now presented, to provide a remedy for these evils.

The first title treats of the modes of preventing apprehended offences, which it is declared may be either by resistance or by the intervention of the officers of justice.

The first chapter, by reference to the corresponding parts of the Penal Code, lays down the rules by which the resistance of the party injured, to offences affecting his person or property, is regulated. The second chapter details the cases in which third persons may interfere, without the sanction of the magistrate, and those in which such interference is not only a right, but a legal as well as a moral duty. In this chapter are contained two provisions which require particular notice. By the first an honorary reward is held out as an inducement for extraordinary exertion in the prevention of crime, or in bringing an offender to justice. This consists in a certificate of the

act, recorded on the minutes of the court, and transmitted to the appointing power to serve as a recommendation for any office in which the qualities manifested by it are required ; to this, in such cases as the governor and judges think worthy of the distinction, a piece of plate, of limited value, may be added. A very high authority (*a*) tells us that recompense, in a despotism, must, to accord with what he terms the principle of the government, be of a pecuniary nature, and honorary in a monarchy ; but that in a republic, founded on virtue, and which he seems to think ought to be its own reward, it ought not to be allowed at all. He admits, that in a monarchy the honour is and ought to be accompanied by fortune ; but why his doctrine should interdict to republics the agency of both honour and profit, upon the human mind for the public good, it is not easy to imagine. If a republic could be composed of men willing to devote their services to their country from a patriotic desire to see it prosper, without the admixture of any other motive, rewards and distinction would be unnecessary ; but such pure attachment to the public good has never been known to pervade any community ; and the reward of public esteem, and the distinction to which it leads, must ever be so closely connected in the mind with the most elevated and disinterested patriotism, as to make it extremely difficult to pronounce the latter motive to have been that which predominated in any given exertion for the public service. All that a wise legislator can be expected to do, is to present such motives as will most effectually attain the end, which, in the case under consideration, is extraordinary exertion for the due execution of the laws. But we must take care that these means are not such as will produce a greater evil than the breach of the laws which they are employed to enforce. Such, I confess, would be a corruption of the morals of the people, or the introduction of any motive that would destroy the fundamental principles of their government.

Let us test the system of rewards for extraordinary services by this rule. There can be no greater incentive



(*a*) Montesquieu, *Esprit des Loix*, l. 5, c. 18.

to voluntary action than the hope of public applause, and when joined to pecuniary recompense and undiminished by any consciousness of wrong, it comprises all, perhaps, that, independent of religious motives, can most forcibly act on the human mind ; it is, therefore, well calculated to produce the effect. For let it be remarked, that it is proposed solely to operate in cases where the fears of punishment cannot be employed ; no man can justly incur a penalty for not doing more than the law requires ; but the public good may, at times, be essentially promoted by such acts. Some motive, therefore, should be held out for their performance. Some passion must be enlisted : it cannot, as we have seen, be fear : it must, then, as the only alternative, be hope—hope of some enjoyment. Of what nature shall that enjoyment be ? With consciousness of well doing, pure love of country unconnected with any personal credit or other advantage, and with public esteem without any substantial testimonials of its existence, legislation can have nothing to do. The first must exist in every uncorrupted mind, whatever may be the operation of the laws ; the second is equally independent of external causes, and the third must, in all societies, in a greater or less degree, attend the performance of actions for the public good. But these motives are not sufficiently general or strong to justify us in relying solely on their operation. Laws must be made for men as they are, not such as an exalted theory of imagined perfection supposes them to be ; and although in every community some may be found capable of doing extraordinary acts of public service, without even the hope of reaping the reward of the esteem of those for whose benefit they were performed ; yet the bulk of mankind require something more. The consciousness of a good action, the knowledge of the benefit it has conferred on the country, and even the persuasion that it is known and silently approved, is not sufficient. Good policy, it is thought, as well as justice, requires that this esteem should be expressed by some external mark ; and that pecuniary recompense, the representative of so many

other enjoyments, should, in particular cases, be super-added as a testimonial of gratitude. That the hope of these additional rewards would strengthen the motive to action, there can be no doubt; and if they do not counteract the more refined and disinterested impulses, which have the same tendency, they may safely be employed; for although laws cannot direct the operations of the mind, yet those laws may promote or discourage them, by offering other co-operating or counteracting inducements to produce or defeat the end proposed; and the inquiry is, which of these effects will be produced by the employment of the rewards proposed in this part of the code? Those held out, for danger incurred, diligence used, or skill displayed in any extraordinary degree, in preventing an offence, or bringing in offenders to justice, are addressed exclusively to love of distinction, and of that distinction only which is founded on public gratitude and esteem. While this passion can be directed to the support of the government, the due execution of the laws and the defence of private right, it supports that which is assumed to be the principle of republican governments; it produces the same effect, excites to the same acts, and cannot be distinguished in its operation from the most exalted public virtue. But the rewards held out by the code, for extraordinary services, are precisely of this nature; a certificate of the fact, recorded, published, and transmitted to the appointing power, to serve as an authentic recommendation for offices requiring the exercise of the qualities displayed. In ordinary cases, this is given by the court; in those which evince higher merit, the concurrence of the governor entitles the party to the additional testimonial of a goblet or vase, of little pecuniary intrinsic value; but the inscription, in which the meritorious act is recorded, placed continually before his eyes and those of his family, raises him in his own esteem, increases the reverence of his domestic circle, and gives him a limited local celebrity, which not only adds to his own happiness, but, within a certain sphere, operates as an incentive to promote that of the public.

Honours conferred for brilliant achievements in war, or eminent services in council, may in a republic be said, perhaps with some propriety, to be liable to objection; not because they are wrong in themselves, but because, by exciting the admiration of the people to a high degree and attaching it to one man, they give him an undue influence that may be sometimes used to the destruction of liberty. But no such consequence can be apprehended from the unpretending, limited popularity and distinction given by the means pointed out by the code. On the contrary, beneficial political effects may be expected by bringing within the reach of those in the humblest station those testimonials of eminent merit, and by associating public favour in their minds with the execution of the laws. He who has risked his life in an unequal encounter with ruffians, either to protect another from their violence, or to secure them for the purpose of punishment, every one will allow deserves public esteem; but it can neither be permanent nor extensive, and, of course, will lose much of its value, if it is confined to the narrow circle of those who happen to have witnessed, or to have been benefited by its exertion. It is soon forgotten, it loses most of its effect as an example, and it is buried in the same oblivion with the every-day transactions which have nothing to impress them on the memory.

*Paulum sepultæ distat inertis
Celata virtus.*

Let the little hero of the hamlet have his celebrity for supporting the laws, and you will have fewer great heroes who seek it by breaking them; and let it be remembered, that the recorded certificate and the engraved goblet are not given to reward the act, but to keep it in memory. The only reward is the public consideration, which will not be measured by the worth of these testimonials, but by the merit and utility of the service rendered.

The provisions of the next succeeding articles are founded on other principles, and, I confess, are liable to stronger objections; they give a pecuniary reward to him who denounces the commission of certain crimes.

1. In order to bring offenders to justice, two distinct duties are to be performed. The public officer must prosecute; but he cannot do this until the private individual, who has suffered by the offence, or knows that it has been committed, shall accuse. In most cases we may safely rely, for the performance of this last mentioned duty, upon the feeling of resentment for the injury, or upon a sense of public justice. There are cases, however, in which neither of these motives exist, or are not sufficiently strong to produce the desired effect, and in which, to secure the execution of the laws, other inducements must be brought to bear. Punishments and rewards are those only which the legislator has at his disposal. The first, it was thought, ought not on this occasion to be used, for the general reason, that the denunciation of penalties ought not to be multiplied without evident necessity; and also, because it was thought proper to make a sensible distinction between the omission to give notice of an intended crime, so as to prevent its commission (which is made punishable by the code), and the failure to denounce a crime already committed. As the punishment for the first offence was necessarily placed very low on the scale, the other must either have been rated so low as scarcely to deserve the name of punishment, or else so high as to run the risk of confounding two acts, somewhat similar in their nature, but very different in their injurious effects. There was moreover another reason for not employing the sanction of punishment on this occasion. It is a wise maxim in legislation, never to enact laws that the prejudices of the people, or other circumstances, will not allow you to enforce. Oppressive laws have in most countries, and from the remotest antiquity, caused those by whom they were governed to array themselves against their execution; and whenever any one of their own number lent his voluntary aid in enforcing them, to consider him as a betrayer of their common interest. For which reason a degree of infamy became attached to the name and office of the informer, which has extended itself in a greater or

less degree to those who voluntarily offer evidence of the infraction of the laws, even in countries where they are neither oppressive nor unjust. To impose a penalty, therefore, on those who, guilty of no crime themselves, should shrink from taking upon themselves the task of accusers, would seem unjust, even if the penalty be enforced, which, in the common course of things, would rarely happen. First, because it is scarcely ever susceptible of proof. If I have witnessed the commission of the crime and do not inform, who is to accuse me? not the offender, surely. Not the injured party: for, if he be alive, and desire the prosecution, he is the proper accuser. Not another witness: for he is in the same predicament with myself if he omit to denounce it, and if he do not, then his information dispenses with the necessity for mine. Besides, while the prejudice against the character of an informer exists, it will attach with tenfold force to him who should assume that office, in order to punish another for refusing to incur the odium that he has voluntarily undertaken.

2. Secondly, if that difficulty be surmounted and a prosecutor be found, jurors will not easily be persuaded to convict; and when they do, public prejudice will operate upon the pardoning power to interfere. Again—suppose the person to whom I may have confessed that I was the unwilling witness of a crime of which I refused to become the relator, should himself omit to become my accuser, the law will not be executed. Will you enact penalty for him also, and another for the one who omits to accuse him, and so in endless succession? No, you must stop somewhere, and rely on a sense of duty, or some other motive, to procure the necessary information. This once granted, it is evident that this resting place is at the first link in the chain, and that you will more probably obtain information against the original offender than against those who have not denounced him. The fear of punishment, then, does not seem to be the best means we can employ on this occasion. There remains the hope of reward. We have seen that the

prejudice against informers originated in the injustice and oppressive nature of the laws, which forced upon the people the conviction that their interest and that of those by whom they were governed, were totally distinct. But when the laws are evidently made for the benefit of the people, much more when they themselves make the laws, this prejudice ought not to exist ; yet such is the force of habits, of thinking, and the association of ideas to particular terms, that although the reason in a great measure ceases to exist, although the reform of our laws will take it entirely away, yet the effect remains, and we can only hope to see it entirely destroyed by the operation of time and of wise legislation : it is in vain to attempt to eradicate it by penalties. The first step is the enactment of good laws, and convincing the people, by making them intelligible as well as good, that they are so. This will lead them by degrees, to the conviction that there can be no dishonour attached to any legal act by which the public good is promoted. A worthy citizen will then consider it no more disgrace to inform or prosecute any infringement of the laws by public offences, than he now does to complain of injury to his own person or property. No ministry of the law will then be deemed degrading ; and from the bailiff who arrests, to the judge who sentences the offender, the warden who superintends his labour, and the divine who conducts him to reformation, all will, in different degrees, be considered as joint labourers in the same great and honourable work. If your laws for regulating arrests were just and well understood, the petty oppression of the constable would cease, and his office would become respectable. Where the interior of prisons in the United States have been thrown open to public view, and they have ceased to become the scenes of vice, filth, and oppression, the keepers have risen to the rank in society to which their important duties entitle them. Men of respectability and talents are employed as wardens of your penitentiaries, without repugnance they become the executioners of the sentences of your courts against criminals, because the laws which condemn them are just

—because the severity of the punishment does not enlist public feeling against those who inflict it—and because the good sense of the people has discovered that the laws are made for their own benefit, and ought to be executed. He need not be very old to remember the period when the place of jailor was considered so odious that very rarely would a man esteemed in society accept it; yet now the office of keeper of a state prison is sought for by honourable men as an honourable office. What has produced this change? The question is not a difficult one, and the answer has been anticipated.

We come, then, to the conclusion, pointed out by reason, and confirmed by experience: that the ministers employed in the execution of just and mild laws, well understood by an intelligent people, will in no grade of their rank be considered as dishonourable; and as a just consequence, that the duty of aiding them will not be so considered. The immediate question then recurs,—will the acceptance of a reward for such aid attach any odium to the performance of the duty? The officer receives a salary or fees for the performance of his permanent functions, why should not the individual receive a compensation for his occasional service? In both cases there is a sacrifice of private convenience to produce a public good: why should it not, in both cases, be compensated? Public prejudice is against it: this cannot be denied; but the same prejudice formerly existed against the functions of the regular officer, yet we have seen this giving way gradually to the force of truth and the increase of knowledge. Why may not the same effect be expected in this analogous case? With this hope, the text of the law contains the reason for enacting it; it exposes the folly and danger of the prejudice that would counteract it; and protects those who are independent enough to do the duty and receive the reward, by a penalty against any defamatory reproaches against them, which the remains of a groundless prejudice might suggest. The reward is pecuniary only; it is moderate, and it is confined to certain offences. To have made it honorary, would have been to destroy the very

nature of that recompense, by making it too common. The amount is sufficient in most cases to indemnify for the loss of time and for the trouble attending the service, and not so great as to offer any temptation for false accusations. It is given only for the denunciation of great offences, in the punishment of which the public have a peculiar interest ; and it is extended to breaches of the laws against duelling and forgery, because, in the one instance, the prejudices of false honour call for some additional motive to induce persons to give information ; and in the other, an attention to private interest might induce the person who had been defrauded, to make compromises that would defeat the ends of justice, unless it were made the interest of some other person to prosecute. No offence that is only made punishable on the complaint of the party injured, comes within this provision. An accomplice cannot claim the reward, because it would be in vain to offer it to him without adding to it the promise of impunity ; nor can the party injured, because, in many cases, his testimony is necessary for conviction, and it was not deemed proper to place him in a situation that must necessarily detract from his credit.

The third and fourth chapters of this title prescribe the manner in which the interference of the magistrate may be required to prevent offences, or to restore to the proprietor articles which may have been illegally and fraudulently taken from his possession. In the first branch (the prosecution of an intended offence by requiring security), the regulations of the English law, as far as they could with certainty be discovered, have been followed ; and where its rules were uncertain or defective, provisions have been added in accordance with the spirit of that law (by which, on this, as on other occasions, I repeat it, I have been guided when I found it to accord with the principles established in the report that has met your approbation). To obtain the required security, the party must declare, upon oath, that he fears some offence will be committed against his person or property by some person or persons he has designated ; he must add the reasons

which cause his apprehension ; and if the cause assigned shall, in the opinion of the magistrate, justify the fear, he shall direct the person complained of to be brought before him. The fear entertained must be that the offence will be committed by violence, because against every other injury to person or property every one is supposed to be able to protect himself by proper care. The duty of the magistrate to hear the party accused, and examine his proof, is pointed out ; the security is set forth, and the cases in which courts may exact it on conviction. A provision, entirely new, is introduced, by which the magistrate, before whom complaint is made of an intended offence, when the proof does not show that the complainant had just ground of fear, is directed, before he discharges the accused, to explain to him the nature of the offence which was endeavoured to be guarded against, and the punishment annexed to it by law, and to admonish him that if he should commit the same, he will incur the highest penalty that can be inflicted by law for such offence. Another article directs the like admonition, and prescribes the same consequences, in cases of applications setting forth a well-founded apprehension of an intended defamation, by speech, by writing, or by printing. The constitution of our state forbids any previous restraint, even when such intent shall be proved ; but as it makes the party liable for the abuse of the liberty it gives, it was thought that the evil might, in some measure, be prevented by the fear of the increased punishment, if the offence should be committed after the admonition.

By the search for property taken by theft or fraud, some of the most important rights of the citizen are at least endangered, if not actually invaded. Too many precautions, therefore, cannot be taken to prevent the mischiefs that might arise from its abuse ; and if the observance of the forms prescribed should sometimes involve the loss of property, the evil will be less than the vexation which a less restrained power to invade the domicile of the citizen would inevitably occasion. In framing this chapter the utmost care, therefore, has been taken to guide the judge

in the exercise of the discretion which must necessarily direct him in this important function of his office—to point out precisely the cases in which alone he can perform it—to state what evidence he should require in each of those several cases—to direct, with the most minute precision, the material parts of the order he shall issue, and to provide that such order shall confer all the powers necessary for the attainment of the ends proposed, and also every limitation to prevent abuse and secure the innocent from injury, and even those who may afterwards be found guilty from vexation. The duties of the magistrate, of the parties, the witnesses, and particularly of the officers who execute the writ, are separately, and it is hoped clearly and accurately, detailed; and the penalties for any vexatious complaint, or abuse of authority, or denial of justice, are denounced.

Some of these provisions are new; and those which are not so, appear for the first time in their natural order and connexion with each other; and it is believed, that if they should receive the legislative sanction, much petty oppression, extortion and fraud will be prevented, of which the ignorant and indigent may otherwise become the victims. This class, depressed by their circumstances, perhaps by their vices or indolent habits, incapable, from their want of instruction, of asserting their rights, are those who most need the protection of the laws, and in most countries they are those who receive the least.

A second title of this book is devoted to the means of putting an end to such offences as are permanent or continuous in their nature. The first six chapters of which relate to the means of putting a stop to the several offences discussed in the Code of Crimes and Punishments, as those against public tranquillity, public health and safety, the enjoyment of public tranquillity, public and common property, morals and decency, and repudiation. These consist chiefly of references to the correspondent parts of that code, which, on these heads, direct the interference of the magistrate, or regulate the exertion of personal influence. The seventh book is highly important. Under

the title of suppressing offences against personal liberty, it contains the regulations for granting and enforcing the writ of habeas corpus. No exposition of this chapter is necessary; because it has already received the sanction of your predecessors; and because the subject is fully discussed in the Report on the plan of a Penal Code, which received the approbation of the legislature in 1822. Detached parts of this book have been enacted into a law, incorporated in the Code of Civil Procedure; but I submit to the legislature the propriety of repealing so much of that code as relates to this subject, which surely is no part of civil process, and suffering the whole, as now presented and formerly approved, to occupy its place in the present code. This title closes by a chapter directing the manner in which permanent offences against property are to be suppressed, and possession restored to the owners of that which has been seized as stolen or fraudulently obtained.

A short but very important title, consisting of two chapters, contains the regulations for calling out and employing the military, in aid of the civil power. The first chapter designates the cases in which that power may be called for, and the mode of making the application. The second regulates the manner in which the military force may be employed. By military force is intended the militia of the state: and the code provides, that it can only be employed by order of the governor, or, when he is too distant to act, by that of the militia-general commanding the district; and the order can only be given on the application, in writing, of three magistrates, one of whom must be a judge, supported by an affidavit of two inhabitants, stating that a riot or insurrection has taken place in the parish in which they reside, and that it cannot be quelled by the force of the ordinary civil authority. The application must state the circumstances of the case and the number of men that will probably be required to restore order. On this application, the governor or commanding officer is authorized to direct the proper militia force to march to the place indicated, under the command of an

officer of requisite rank, and put himself under the direction of the magistrates who made the requisition.

In all riots or insurrections, the immediate, sometimes the ultimate, object is violence to some obnoxious person, or the plunder or destruction of property. To protect these, without the useless sacrifice of human life, is the object of the laws on this subject; therefore, all the provisions of this chapter are intended, if possible, to stop the violence by the fear of an armed force, without having recourse to its dreadful execution. The militia are only to be employed where the ordinary civil power has been tried and found insufficient. It is, when practicable, to be stationed between the rioters and the object of their intended violence; to act strictly on the defensive, and under the direction of the magistrate. When the use of weapons becomes necessary, to use only those, such as the bayonet and sword, which may be directed solely against the assailants, without endangering the lives of others; leaving the more dangerous and uncontrollable effect of fire-arms (which may injure the innocent as well as the guilty) for the last resort. In no case can the armed force be brought up before the magistrate has displayed a white flag, and ordered the rioters to disperse; and unless to repel an attack endangering life, no order is to be given for the use of offensive arms, until half an hour has elapsed after the order to disperse, without its being obeyed. The remarks on this chapter cannot be closed without observing the essential difference between the nature of the armed force, the use of which is contemplated by the code, and that employed on similar occasions in England and other countries in Europe. There it is composed of men entirely under the control of the executive branch of the government, upon which they depend entirely for subsistence. Here, except in the circumstances of their being organized and armed, they differ in nothing from the power which is at the daily call of the civil officer. Without arms or military array, they are the common *posse comitatus*, as it is called, for civil power of the country; the protectors of property, of family, of life, of country and of

liberty, to make them effective instruments for the suppression of disorder, and the most unfit, even when disciplined and armed, that could be chosen to promote any scheme of usurpation. The people can apprehend no danger to their liberties from such a force, even when it is actively employed against themselves—when deceived by the factious, agitated by party, or indignant against real or imagined injury, they are led to oppose the operation of the laws. Yet with all these safeguards, the legislator would be unfaithful to his trust, who should neglect other precautions against the necessary evil of employing the weapons of war in the work of peace. According to the erroneous ideas of the ancient jurisprudence, the sword of justice always was unsheathed, always brandished. In our more correct conceptions, it is never placed in her hands, but is the last extreme of necessity.

The review of that part of the code which relates to preventive procedure, is now finished. It is a meagre title in the English, and as sterile in our law, for we have added nothing by statute to that part of the common law which we have adopted; and in the laws of other nations, with which, however, I am but very imperfectly acquainted, I find little or nothing on this important branch of jurisprudence. Pains and penalties! Everywhere penalties! Every contrivance to punish—scarcely a provision to prevent or repress! If I did not think it, in some measure, disrespectful to the honourable body I address, to express a doubt, that every part of the plan they have directed to be laid before them would receive equal attention, I should venture to request a scrupulous examination of the title we have just reviewed, as one of the most vital importance. I would entreat them to enlarge it by such enactments as their superior wisdom should suggest, for the great, the sacred object of preventing offences, rather than punishing them; and I dare, even at the risk of being thought importunate, and of tiring them by repeating the same argument, earnestly pray them to consider deeply the necessity of early education—general education—religious, moral and literary education, as the great lever for raising the people

bove the temptation of crime, and the only means by which offences may be prevented by the moral sense, rather than repressed by the operation of law ; and in connexion with this important branch of our subject, I refer to the different establishments provided for by the Code of Prison Discipline, under the heads of School for Reform, House of Detention, and House of Refuge ; and to the reasons which will be urged in the Introductory Report to that Code for this establishment.

Having considered the means of preventing inchoate offences, and arresting the course of such as are in operation, we now approach that which may perhaps, with a stricter propriety, be considered as a Code of Criminal Procedure, that is to say, the mode of conducting prosecutions for offences already consummated. This is the subject of the second book of the Code. The first title of this book contains the law of Arrest and Bail, two very important subjects ; hitherto left, for the most part, without positive legislation to guide the officer, the magistrate and the citizen, in the daily calls upon them to act in the prosecution of alleged offences, or to direct the accused in the assertion of his rights. By this part of the Code the omission is endeavoured to be supplied. The first chapter contains definitions and general principles necessary for the full understanding of the provisions which follow, and of the reasons on which they are enacted. The nature of a complaint for an alleged offence is explained, and its effects pointed out. What proof of such complaint is necessary to give it the force of a legal accusation, and to justify an order of arrest, is stated. The necessity of such arrest, to ensure the appearance of the witness on the trial, the necessity of the commitment further to secure that end, and the condition of the pledge contained in the contract of bail, are fully explained and elucidated. These follow in regular order and in successive chapters, each one appropriated to a distinct head. The first specifies the mode of making the complaint and accusation, and of granting the order of arrest. This last mentioned subject, the order of arrest, is the subject of a separate section. To

deprive a citizen of liberty, before he is convicted of any offence, can only be justified by the necessity of securing his appearance to attend the trial and suffer the penalty, if the charge be well founded. But it cannot be justified at all in the following cases : first, where the punishment annexed to the offence is so light as to destroy the presumption that the accused would avoid it by flight—in other words, where the inconvenience attending flight, would be greater than the evil of the punishment ; secondly, when the evidence is not such as to justify a belief that the accused is guilty ; nor lastly, where the accused will give such a pledge for his appearance as will render it more probable that he will remain, and either show his innocence or suffer the penalty of his guilt, than that he will forfeit the pledge he has given. The chapter is drawn in accordance with these views of the subject. In case of misdemeanor, where there is no possibility that the party will incur the certain evil of flight, to avoid the comparatively light suffering of the penalty directed by law, there is no arrest, unless it be incurred by wilful disobedience to a citation commanding the party to appear. In accusations of a graver nature, the evidence in support of them must be on oath ; it must be positive that the offence has been committed, and produce belief in the mind of the magistrate that the person designated has committed it, before the order for his arrest can be granted. The complaint, and the evidence in support of it, must be reduced to writing, signed and sworn to by the witnesses. The order must plainly designate the offence charged, that the defendant may be prepared on his appearance before the magistrate with his defence, and it must be delivered to an officer of justice who is to make the arrest. In order, as far as possible, to avoid oppression, to ensure the due execution of the law, to protect the officer against the effects of mistake in the performance of his duty, and to point out to private citizens that which may be required of them when called on to assist him, as well as to designate to the accused the bounds between legal resistance and the submission required by law ; all these points are fully

explained under distinct heads in this chapter. Great care has been taken in framing the law on these heads, so as to make it clear to the most common understanding ; because, in the whole course of procedure, there is no circumstance productive of so many vexatious proceedings and serious and frequently fatal effects, as that of arrests. Officers of justice, often uneducated and overbearing men, either do not know, or designedly exceed, the bounds of their authority. The accused sometimes submits to illegal acts, at others, resists those to which he ought to submit. The citizen, when legally called on to enforce the execution of the law, refuses to obey, or makes himself liable to prosecution for aiding in an illegal arrest ; and it is believed, that of all the cases of murder, manslaughter, violent assault and false imprisonment, reported in the books, no inconsiderable proportion will be found to have arisen from ignorance of rights and duties in granting warrants, in making arrests, or resisting them—ignorance inevitable, from the state of our laws ; for where (it is asked on this as it has been on former occasions), where is the necessary information to be obtained ? The written law is silent ; the oracles who pronounce that which is unwritten only speak when the case has already happened ; and the unfortunate citizen, called on to act or suffer at a moment's warning, is forced to do it at his own risk ; for those to whom he has confided the care of framing rules for his government, have hitherto obstinately refused, or negligently omitted to dictate them. It is time that this duty should be done : it is more than time that this reproach should be done away from our legislation. You declare, that every man who kills an officer in the legal discharge of his duty, is guilty of murder, and shall suffer death. You say, that resistance to an unlawful arrest is justifiable ; and you cruelly and wantonly refuse to explain what is a lawful and which an unlawful arrest. You refer to the contradictory and confused decisions of courts in a foreign country for information on this all-important point. Do you understand those laws ? Are they clear ?—deign then to clothe them in the words of

legislative authority : publish them to your constituents. Are the cases contradictory ?—tell us which of them is the law. Are they confused and uncertain ?—explain them. Do you not understand them yourselves ?—then how should we, your constituents, be guided by them, in matters too on which depend life or death ? If the rules now offered are not approved, frame others. When obedience is exacted, under such a sanction, the least the people can require is to be clearly and explicitly told what it is they are to obey. I feel that I am repeating here ideas that have been more than once expressed, and that I am urging former arguments with a zeal that may be deemed indiscreet, and, I hope, is unnecessary ; but I have a great, a holy duty to perform, and I dare not leave any part of it undone, from the fear of giving offence, or the hope of conciliating favour, much less that of gaining applause. The solemn truth must be told, must be repeated, until it is felt. “LEGISLATORS ARE IN EFFECT THE MURDERERS OF THOSE WHO PERISH BY THEIR WILFUL NEGLECT TO PROVIDE GOOD, OR TO REPEAL BAD LAWS.” This responsibility cannot be thrown off, or even divided, however numerous the body upon whom it devolves : it attaches to every individual whose vote is counted either against the reform or for postponing it to other matters of minor consideration : and the reflection finds its place very naturally at the close of a review of the chapter relating to arrests, a subject in which so many require the aid of the law to guide them, by clear and precise rules, in order to avoid heavy penalties ; in which so few receive that aid at all, and none in the manner in which it ought to be afforded.

The arrest being made, the next proceeding is to bring the accused before the magistrate, that he may proceed to examine and discharge, commit, remand for further examination, or deliver to bail. Rules are laid down in the fourth chapter for each of these alternative duties. The first is the examination. Our present law prescribes, that the magistrate is to reduce to writing the answers which the accused may voluntarily make to such questions as may be put to him without any threat or promise, and

the construction put upon this has, I believe, generally been that no inference against the prisoner is to be made from his refusal to answer such question; and practice, which with us so frequently usurps the authority of law, has established it as a rule frequently followed, to declare this explicitly to the prisoner, thereby inviting him to silence, and, of course, depriving the prosecution of the advantage to be derived from his communications. The course directed by the code is somewhat different, and requires some discussion.

The great object of all criminal procedure is the conviction of the guilty—but of the guilty only. Every precaution which the wisest legislation can suggest, should be employed to prevent its falling on the innocent. Yet such is the imperfection of all human institutions, that, after these precautions are taken, it must happen that innocence is sometimes mistaken for guilt, and incurs its punishment. To require, therefore, that a code of procedure should be so framed as to prevent the possibility of this error, would be absurd; and the only mode of affording perfect security from conviction to the innocent, would be to extend impunity to the guilty. All that the best legislation on this subject can do, is to take every precaution consistent with the main object (the conviction of guilt), to secure innocence from being confounded with it before condemnation, and to correct any errors which may afterwards be discovered. Therefore, it is no good objection to any particular part of criminal procedure to say, that it may involve the innocent. That we have seen is, in some cases, inevitable under the best systems. Every question, therefore, of this nature, must be one which presents a choice between two measures, each of which has some portion of evil attached to it, and it must consequently always be one of sound discretion to take that which has the least.

In the examination of the accused, the advantage is, that if guilty, he will frequently betray himself by his own story. The truth would be a confession. He must have recourse, therefore, to falsehood; but, as error is

infinite, he will state some things which can be easily disproved by circumstances or by other witnesses, and the investigation of which would lead to his conviction. Suppose him, on the other hand, to be innocent: his statements would contain the truth, because he has no need of concealment, and the circumstances and witnesses which would detect his falsehood, in the one case, will evince his truth in the other. If the magistrate, who examines, in this preparatory stage, were the tribunal which finally tries, there would be another advantage in permitting the interrogation of the accused, his looks, his manner of answering, his hesitation or promptitude, even his silence, would have their effect in determining on his innocence or guilt. But we are now speaking of the examination before the committing magistrate, who has seldom any agency in the final trial; and even when the examination is made before the judge who afterwards presides at such trial, the jury, not the judge, are to determine the question of guilt, therefore, no impression that can be made in favour of the prisoner or against him, from his manner and appearance on his examination, can have any avail on the trial. From this circumstance arises the first item in the detail of disadvantages attending the subjecting the prisoner to examination—that his answers, not being heard by those who are to decide on his innocence or guilt, can only be communicated to them by being reduced to writing. The difficulty of doing this, so as to express precisely the ideas intended to be conveyed, cannot be appreciated but by professional men, who must have witnessed how often inaccuracy of expression in the speaker and carelessness or misapprehension in the scribe, concur in producing the most dangerous errors, even without supposing any intent to mislead or falsify. An unrestrained right of interrogating is also very apt to produce insidious and catching questions. Instead of a cool and impartial attempt to extract the truth, the examination becomes a contest, in which the pride and ingenuity of the magistrate are arrayed against the caution or evasions of the accused, and every construc-

tion will be given to his answers that may fix upon him the imputation of guilt. After weighing these and other arguments on both sides of this important question, I came to this conclusion, that it would be unwise to abandon the advantage to be derived from an examination of the accused ; but at the same time, that justice required us to reduce to their lowest term the two inseparable evils attached to this mode of proceeding, and I thought that this might be effected by restricting the magistrate to a prescribed form of interrogatory, so drawn that no innocent person could be entrapped by answering ; while, at the same time, evasions or untrue answers might frequently lead to the detection of guilt ; and to avoid inaccuracies in recording the answers, the interrogatories are pointed only to such simple circumstances as can be detailed with the greatest simplicity of language, and they are not considered as complete until they have been signed by the party and corrected by him, so as to express exactly the idea he meant to convey ; if we add to this that he has the assistance of counsel, and has heard what the witnesses against him have deposed, it will be found that the accused is in no danger of being circumvented or intimidated to his prejudice in the preliminary examination. He is first apprised that although he may refuse to answer the interrogatories that are about to be put to him, or answer them in any way he may think fit, yet a false answer, or his refusal to give any, must operate against him on the trial. This consequence is inevitable, and under our present practice, where he is expressly told that he is at perfect liberty to answer or not, as he pleases, which implies that no injury can result to him from his silence, the same result is produced ; and the prisoner is invited to silence by being assured that it will do him no injury, when in the nature of things the jury cannot but infer guilt from false representations, or from silence, without any motive but that of concealing the truth ; either of which circumstances, when they occur, are given in evidence according to our present practice. It was, therefore, thought, that justice to the

prisoner, as well as to the public, required that full notice should be given of the deductions that would be drawn from his silence or evasions.

It cannot be denied, however, that cases may be supposed in which even the guiltless may be induced, from a strange combination of circumstances, to remain silent, or to give a false colouring to the transaction which has involved them in suspicion. But this reflection did not prevent my adopting the mode of interrogation which I recommend: First, because the existence of such circumstances must be of very doubtful occurrence; and if they should happen, the cases in which they occur being, according to other parts of the proposed system, within the reach of remission and compensation, ought not to form an objection to a part of procedure otherwise advantageous. Secondly, because the same objection lies to our present practice, and must attach to any other that may be adopted, there being nothing that can secure the accused, if he is tried at all, from the unfavourable impression that his silence or falsehood may make upon his judges if he is in any way interrogated, or from the effects of circumstances which render guilt probable, if they cannot be explained. With this explanation of the reasons on which it is founded, the attention of the legislature is requested to the fourth chapter, and it is hoped that it will be found to contain every provision necessary to protect the prisoner from any effects injurious to his safety, arising from surprise, intimidation, or false hopes, if he be innocent; and at the same time secure to the prosecution the advantage of that evidence which a consciousness of guilt will generally furnish in his answers to the interrogatories. A prejudice, but it appears to me a groundless one, and certainly very favourable to the escape of the guilty, exists against procuring testimony from the judicial examination of the party accused before a magistrate; and yet, without scruple, we admit testimony of his informal and private confessions to individuals, as if he would be more apt to inculcate himself without cause when put on his guard by the admonition of the judge, and a knowledge of the con-

sequences, than he would be in a loose conversation which he must imagine would never be repeated, and as if the record of what he has said, corrected and signed by himself after due deliberation and with the assistance of counsel, were not as high evidence of the fact, as the declaration of a casual witness who may purposely misrepresent the terms of the confession, or unintentionally give it a false colouring. It cannot be denied that an innocent man of very weak nerves may sometimes, in his confusion, give contradictory or false statements that may endanger his safety, or do acts that cannot be accounted for but on a supposition of guilt. So may an innocent man incur the danger of conviction from an untoward combination of circumstances which he cannot explain, or from the misapprehension, or direct perjury of witnesses. Yet the risk must be incurred in both cases, unless we abandon altogether, in the last instance, the prosecution for crimes; and in the first, all advantage to be drawn, in any shape, from the best source, the acts and confessions of the party accused: and all that can be required in a good system of procedure, is to put these in such a form as will insure authenticity, and guard against error, intimidation, or the effects of false hopes. It is believed this has been done. The prisoner is allowed the assistance of counsel; he may examine the depositions and question the witnesses against him, before he is called on to answer the interrogatories that are to be propounded to him: the form of these is prescribed by law. He is informed that he cannot be forced to answer them, but he is admonished that silence or falsehood must be a circumstance that will operate against him. His answers, if he give any, are reduced to writing by the magistrate; they are submitted to his perusal and correction, and he signs them with such additions and alterations as he deems proper; and if after all any error should have occurred, means are afforded, on the trial, to correct it by explanation, and by the examination of witnesses, before an impartial jury.

The next step, after examination, is to discharge, remand, or commit the prisoner. The first is the duty of the

magistrate, when the evidence adduced by the prosecution is not such as leaves on the mind a belief that the crime has been committed, or that the prisoner has been guilty of it. This being only a preparatory proceeding, the magistrate is directed not to require such proof as would justify a conviction : his duty, in this respect, is precisely pointed out. If there be positive evidence, directly charging the prisoner with the commission of the offence, although he may produce contradictory proof, the magistrate cannot discharge, the task of weighing the exculpatory evidence being reserved for the jury on the trial. When the evidence is circumstantial only, and does not bring the mind to a belief of guilt, the defendant must be discharged ; but in this case, it is a belief only, not a firm conviction of guilt that is required, by which is meant, that the rule laid down for guiding the conscience of a juror on the trial must be reversed as respects that of the magistrate on the question of discharging him. In order to convict, the juror must have no doubt of the prisoner's guilt ; to discharge him, the magistrate must have none of his innocence. The result of an examination may be such as to show that other proof, within the reach of the magistrate, may be required ; in which case the prisoner is remanded, or sent back to the custody of the officer by whom he was arrested, or to the prison in which he was confined ; and at a proper and designated period he is again brought up and the examination proceeds. If the magistrate be not convinced of the defendant's innocence, he must either commit him to prison or take bail for his appearance, and the performance of this duty is one in which the highest confidence is necessarily placed in the discretion of the magistrate. The nature of the contract of bail is too well known to need any explanation. Its theory was to place the accused in the watchful (a) care of persons who have confidence in him, and who are interested in preventing his escape by the fear of losing the penalty of the bond ;

(a) The French word *surveillance* expresses the idea I mean to convey, better than even the periphrase I am forced to use, for want of a corresponding word in our language.

and it was also thought that the confidence reposed in him by his sureties was such proof of good character as formed a presumption that he was not guilty ; but experience, in many cases, shakes the ground-work of this theory. The bail may always be indemnified when the defendant is wealthy and conscious of guilt ; and the confidence is generally reposed more in his means than his character. Hence, it is apparent, that where bail is a matter of right, the defendant can always change the penalty of the law into expatriation, and a pecuniary fine to the amount of the bond. Therefore the law, while it allows bail in case of doubt or in offences where these consequences would be a sufficient punishment, ought, in those of a higher nature, and where the proof is strong, to secure the appearance of the party by other means. Unfortunately the framers of our constitution have restricted legislation on this subject within very narrow bounds, and on one construction have taken it away altogether, if we should, as I cannot but hope we shall, abolish the punishment of death. The constitution declares, that "all prisoners shall be bailable by sufficient securities, except for capital offences where the proof is evident or the presumption great." On the construction I have adopted, the magistrate may refuse bail in offences where the "proof is evident or the presumption strong" in offences which, in the time of making the constitution, were capitally punished : these were murder, rape, exciting insurrection among slaves, and stabbing or shooting with intent to murder. But that in all other cases he is bound to take sufficient bail. Nor can any legislative provision, except perhaps that of making the offence capital, enlarge the constitutional restriction. I express myself hesitatingly, because I am not sure what the courts would say on this question ; whether the constitution intended such cases as were then capital, or those which the legislature might afterwards declare to be such, or whether when the offence ceases to be punished by death, the constitutional rule with regard to bail remains unchanged. This restriction on the powers of the legislature I consider unfortunate. A highway robber arrested

with his pistol at the traveller's breast—a forger taken in the act of passing or making his false bills—every other offender, be his guilt ever so atrocious, or the proof of it ever so apparent, must be let out on bail, and, if he has secured the means of indemnifying his sureties, may change the punishment directed by law, for a fine and expatriation or concealment. Constitutionally, therefore, the magistrate could be invested by the code with the discretionary power to bail or not to bail in but few cases, and on one construction, as we have seen (capital punishment being abolished), in none. There is, however, no such restraint upon his discretion as to the amount of the security ; and this being the only remedy for the evil, great pains have been taken in the framing of rules for the guidance of the magistrate in the performance of this important duty. If there be any occasion in which it is proper for the legislator to declare what he expects from the judgment, as well as what he commands from the obedience of a functionary of the law, it is the one now under consideration ; because the magistrates, who are to perform the duty, are commonly unused by previous habit or professional education to the consideration of the questions to which it gives rise ; and because of the high importance of the due exercise of this discretion, as well to the public as to the individuals more immediately concerned. There are those, however, who consider that the law should do nothing but command, and that its commands should always be sanctioned by some penalty for disobedience. The arguments which enforce this doctrine seem to be founded on the idea that there is some paramount power, even superior to that of a constitutional law, which limits legislative power by certain rules of form as well as of moral duty in the exercise of its functions. Utility prescribes the last, but from what source is the first derived ? We feel that there is an obligation not to enjoin the performance of immoral acts, and we are at no loss to discover the source of this duty. But when we are told, you are to prescribe nothing that you cannot or do not enforce by a penalty, we must seek in vain for some good reason for

the maxim. The lawgiver cannot foresee the circumstances of every case, and if he could foresee, he could not describe them ; he must, therefore, give general rules, and trust, within certain limits, to the discretion of the judge, the power to modify and adapt them to suit particular cases ; that is to say, he must delegate that part of his duty which he cannot perform himself ; and in making this transfer, it would seem not only right but highly useful to give the rules and lay down the principles according to which he desires it to be exercised. This cannot be done by positive command, because it is to operate on the mind and direct the judgment, not the action ; and as this is a delegation of discretionary power, it would be absurd to annex a penalty to an honest, although improper exercise of it, provided the limits of the discretion were not exceeded. To illustrate this reasoning by an example drawn from the part of the code which is in question—the magistrate, in admitting to bail, is directed, in general terms, so to apportion the amount as not to suffer the wealthy offender to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor ; and he is told that this power is, in its exercise, one of the most delicate and important functions of his office, and he is apprised that his sound discretion is to direct it. It is clear that here there can be neither positive command, nor penalty for its breach ; if there were, it would no longer be discretion. Yet can it reasonably be said, that legislation derogates from its dignity, or performs a superfluous task when it points out to the magistrate the objects he ought to have in view, and the principles by which he is to be guided, in order to attain it ? But the whole duty is not left to the discretion of the magistrate. Whatever could be foreseen, and provided for, by that of the law, is reduced to positive precept, and its breach incurs the penalty attached to disobedience. Thus, where the punishment is fine, the bail must exceed the maximum of the penalty ; where it is simple imprisonment, one rule is fixed ; where the imprisonment is in the penitentiary, another ; other rules are laid down for apportionment in other particular cases ; and the

discretion of the judge is reduced in this, as it has been the object to do in every part of this code, to the strictest limits, within which it can be exercised consistently with justice. Some of these rules and restrictions are new ; others are conformable to present practice ; but all are for the first time reduced to the form of statutory legislation.

The bail being completed, the prisoner is suffered to remain at large until the trial ; but provision is made, that for the security of the bail, they may, at any time, exonerate themselves by his surrender, and the particular mode of doing this is prescribed.

If sufficient bail be not offered, or if the case be one in which the magistrate rightfully refuses to receive it, the prisoner must be committed to prison, to abide the event of his trial if he be not before that time bailed or discharged by the judge of a superior tribunal, or habeas corpus. The order for commitment is directed to be in writing ; its form and essential parts are prescribed, as well as the mode in which it is to be executed ; and all the means that experience or reflection could suggest, have been adopted to prevent the discharge of the prisoner, which so frequently happens from formal defects in the warrant, while every requisite security against abuse and oppression have been carefully provided. After commitment, the prisoner may be bailed or discharged, if the nature of his case permit it. But the inferior magistrate has no other agency in this proceeding than to furnish all the evidence of that which was had before him to the judge before whom the prisoner may be brought, on the return of the writ of habeas corpus ; to the chapter on which subject the legislature is referred for a minute detail of the duties and rights of all parties and agents, from the judge who decides, to the prisoner whose case is before him ; and with this ends the provisions necessary for securing the appearance of the defendant at the trial, by which his guilt or innocence is to be ascertained, and at the judgment, by which it is to be proclaimed. In framing this part of the system, it has never been forgotten, that the guilty were to be brought to punishment with as little inconvenience as possible to the innocent ; and that no pre-

sumption or other evidence of crime could, before trial and conviction, justify any thing more than necessary restraint. With this view, a reverent eye has constantly been kept on those admirable provisions for the security of personal liberty which are to be found in the laws of England, which deserve the gratitude as well as the admiration of the world. Institutions which are every day extending their influence over the happiness of mankind, and which will prove a more lasting and honourable monument of the wisdom, justice and greatness of the nation from whose jurisprudence they are drawn, than any which their splendid victories, their power, their wealth, or even their science, could erect. Of these institutions the writ of habeas corpus is that which applies to this part of our subject. The idea of this remedy is to be found in the Roman law ; but there, as well as in the common law of England, it was ineffectual, until the great statute, of that name, gave it the essential features to which it owes all its utility. These features have been rendered more definite, new provisions and penalties have been added, and, I think, it may now be asserted with truth, that individual liberty can suffer no restraint, which, under this law, will not find an easy, prompt, and unexpensive remedy.

In reviewing the duties of the examining magistrate, among them should have been stated that of taking an obligation from witnesses, under a penalty, to secure their appearance at the trial, and of committing to prison such as refuse to enter into that obligation. Analogous to this is a proceeding which, although an invasion of personal liberty, is practised in most countries, and, I think, justified by the same reasoning which shows the right of taking private property, or coercing personal service, for the public safety. When one who is a necessary witness in the prosecution for an offence punishable by imprisonment for life is not a householder, and consequently wants one principal tie to prevent his departure, and has no friends or connexions who will become bound for his appearance, he may be detained in custody until the trial;

but in this, and in the Code of Prison Discipline, it is specially provided, that he be properly and comfortably supported at the public expense; that he suffer no degrading or contaminating associations while detained; that he be allowed every indulgence, as to occupation, amusement and society, which the good order of the house (for the place of his detention is not characterized as a prison) will allow, and that when discharged, full compensation be made for the loss he has incurred. The duties of the examining magistrate end with transmitting to the proper officer of the court having cognizance of the case all the proceedings which have been had before him, including the original examination as well of the party as of the witnesses; and here opens a new course of proceeding, contained in the second title of this book. It treats of the proceedings subsequent to the commitment or bailing of the prisoner. The first chapter details the manner in which the appearance, as well of the party as the witnesses, is to be enforced, which, as it differs little, except, it is hoped, in precision and certainty, from the mode now in use, needs only a reference to the chapter.

The second contains some regulations which it was thought would introduce order in the arrangement of the different cases preparatory to the indictment or information. Among them is one which obliges the prosecuting officer to designate, before the meeting of the grand jury, on a copy of the calendar furnished to him for that purpose, all such cases of misdemeanor as he may choose to prosecute by information; and the papers, in relation to these cases, are not sent to the grand jury. This is done, as well to avoid any interference between the two accusing powers, as to ensure, on the part of the prosecuting attorney, the performance of his duties. For this officer, after having designated those cases in which he will proceed without the intervention of the grand jury, is bound to file his information before the end of the term; and the court being made acquainted with them, as the cases which are before him, he cannot, if so inclined, favour any one by delay in the prosecution, or throw off the reproach of neglect upon

the grand jury. And that body being obliged, as their exclusive duty, to inquire into all cases of crime, and all those of misdemeanor not selected by the public prosecutor, it follows that every accusation must be disposed of in one or the other mode.

The third chapter is an important one. It relates to the organization and duties of the grand jury. This institution is a favourite one in England and in the United States. But although I consider its advantages outweigh the objections to which it is liable, and have, therefore, preserved for it a place in the system, yet I cannot but suspect that it owes much of its popularity to its name, and to the association which connects it with that invaluable blessing to a free country, the trial by jury. Some part of its utility, too, is traditional only. In the party questions, which at different times have divided the people of England, and which very rarely ended without enlisting the judiciary power on that side which was espoused by the crown, it was sometimes a protection against the combination of royal and judicial oppression, and would have been more frequently so if there had been any means of securing an impartial selection of its members. It is not my intention to present a history of this institution, or a detail of its advantages or inconveniences, in its origin, progress, or present state, in the country from which we have inherited it. It will be sufficient to offer the objections to its establishment here, which have occurred to me, and the reasons in its favour, which I have thought sufficient to countervail them. With such an admirable contrivance for the security of innocence against unjust prosecutions as the trial by jury, where unanimity is required for conviction, any intermediate examination between that made by the committing magistrate and the final trial would seem an obstruction to the course of justice, of which the necessity, or even the convenience, is not very apparent. The secrecy, too, of that examination, and the precautions taken to prevent the slightest responsibility resting on any one of those by whom it is made, it might be argued, give a chance for

favouritism, or undue influence, to interpose in favour of those whose guilt would be apparent on a public trial; while, on the other hand, it might be said that witnesses, according to the usual practice, being heard only to charge the defendant, and heard in secret, he is deprived of the advantage secured to him before the magistrate of showing his innocence by countervailing proof; and thus, in all cases originating by complaint to the grand jury, he would be subject to commitment and trial, on the evidence of circumstances which he might have fully explained had the examination been publicly had before a magistrate. To this it may be added, that grand juries are very rarely, if ever, composed of men having such a knowledge of the law as will enable them to determine what evidence ought to be admitted, to what credit it is entitled, or whether the facts it discloses amount to an offence; and that this ignorance of their duties, or an inattention, which is worse, frequently causes them to mistake or disregard the duties of their office, and assume the cognizance of matters with which they have no concern; sometimes censuring the conduct of political opponents; sometimes lending their influence to promote party views. These objections are weighty, and some of them not ill-founded. But after the fullest consideration, I thought that those to which satisfactory answers could not be given, might be obviated by alterations, which would make none in the general outline of the institution; and, therefore, for the following reasons I adopted it with the modifications contained in the code.

1. First, because it participates largely in that prominent characteristic which distinguishes the trial by jury (*a*), of spreading general information, and a particular acquaintance with the practical operation of the constitution and laws; of creating an attachment to the principles on which they are founded, and, by the periodical performance of an important function, promoting the happiness of the individual by a sense of self-importance, and that of the public, by a constant vigilance over its peace. It

(*a*) See Report on the Plan of a Penal Code.

might, if necessary, easily be shown that each of these effects will be produced by the frequent exercise of the duties of a grand juror; and all of them are objects of the highest consequence in legislation. For, in a government created for the common good of all its citizens, that organization of any department is certainly to be preferred, which, while it is equally well calculated with any other, for the performance of the duties for which it is particularly intended, also opens new sources for individual happiness, diffuses knowledge, fosters an attachment to true principles, and adds stability to the government of which it is a part. It has appeared to me, that a want of attention to such considerations is a common fault in the legislation of our country. We shape our laws to fit the principal end which is proposed, without sufficiently examining whether the same object could be obtained by means that produce other collateral effects of equal or perhaps of greater importance, and avoid dangers which, in our eagerness to attain some doubtful good by a straightforward, off-hand legislation, have totally escaped our attention. Thus, to raise a revenue for some useful purpose, we license gambling-houses; to promote education, and provide for the building of churches, we establish lotteries; to avoid the expense of erecting a penitentiary, we incur that of supporting our convicts in idleness; and put some of our citizens to death, that we may impress on the minds of others the great truth that killing is unlawful. We do this, without sufficiently inquiring whether the requisite revenue might not be obtained by some other and better means than giving the sanction of law to the worst of vices; whether a purer source could not be found, from which to draw the means of supporting religious and scientific education, than one that corrupts morals, encourages idleness, and leads the poorer classes to poverty and vice; whether the crimes which are fostered in the vicious association of confinement without labour, are not infinitely more expensive to the community than the most costly house of labour; and whether shedding man's blood is the most effectual way of showing that it ought not to be shed.

2. Independently of this collateral, but highly important advantage, attached to the institution of grand juries, it was adopted, secondly, because it was already established, and it has been my uniform practice to alter no part of the system but such as could be clearly shown to be defective or inconsistent with other parts of the plan. Whether the present is of this character must depend upon an examination of the objections which have been stated. These are in substance, that the intervention of a second accusing power, between the commitment by the magistrate and the trial, is a useless piece of machinery in penal law; that from its particular organization it is cumbrous, and from its secrecy dangerous; that it may, without responsibility, protect guilt and vex innocence; and that the ignorance of its members frequently leads them into erroneous ideas of their power, which creates confusion in the administration of justice.

The error of the first objection lies in supposing that the commitment of the magistrate, in all cases, contains such an exposition of the circumstances and nature of the offence as would enable the party to prepare for his defence, by knowing exactly, not only with what crime he was charged, but also when, where, and in what manner he is accused of having committed it. But this is far from being the case. If the ministry of the grand jury be dispensed with, that of some other body of men, or of some officer, must be substituted for the performance of this duty. If it be vested in a known officer or a permanent body, he or they being previously known, will be subject to the approaches of influence in all its seducing forms, for the purposes of favour or oppression. Whereas the grand jury, selected by judges totally unconnected in any other manner with the proceeding, out of a very limited number, taken by lot immediately before the session of the court, are out of the reach of any attempt to seduce or intimidate them. If, to obviate this, and at the same time the next objection, that the grand jury is inconveniently great, it should be said, draw your accusing judges also by lot, or let them be appointed by the execu-

tive immediately before they enter on their duties, but let the number be less. it is answered, this expedient gives us still a grand jury. If appointed by the executive, you do not take away the danger of an undue influence; you only change the person to whom it may be addressed. If you take them by lot, in the manner proposed by the code, the only question is, whether the substitution of any smaller number for that now required will be attended with any advantage sufficiently great to justify the change. It is thought not. If no great reduction be made, the difference will scarcely be perceptible in the mode of proceeding. If the number be few, some advantage may be gained in celerity; but a greater lost in the want of information, and in the freer scope given to the influence of favour or animosity among a few. The object of this institution being, not only to make accusations of such infractions of the law as have been prosecuted before the examining magistrate, but the jurors being individually bound to make inquiry into all such as they have reason to think have been committed in the district for which they are assembled, it follows, that a reasonable suspicion, entertained by one of the members and communicated with the circumstances on which it is founded to his fellows, will be sufficient to ground an inquiry; for which purpose they are vested with powers to send for and examine witnesses. This object will obviously be better attained by a numerous than a small body.

The objection drawn from the secrecy of the proceedings before the grand jury, is one that comes in a more imposing shape than any other, in a country where publicity in every department is justly considered as the greatest security for good conduct in those who direct them. Yet there are reasons why I should hesitate to remove the veil that has been drawn over the proceedings of the grand jury room. To appreciate these reasons, we must consider the constitution of this body and the nature of their duties. The members are not appointed or chosen to perform the functions of an office, but designated, as we have seen, by lot to perform a service, an onerous one, which

they have not courted, and to which they have not been called by an appointment which they might accept or refuse. It would seem unjust, therefore, to expose an individual, thus performing an involuntary duty, to the odium or suspicion inseparably attached to it, for any erroneous but honest expression of his opinion; and against the prosecution for corrupt or other illegal conduct, the oath of secrecy taken by his fellows is no protection. It must be remembered, too, that the honest and useful prejudice against secret informers, although it may have contributed to give force to this objection, has in reality no application to the proceedings before a grand jury. When any member of this body prefers an accusation, he becomes a witness, his deposition is taken, and with that of every other witness, is handed into court. The secrecy is not in the accusation, or in the name of the witness who makes it, but it is confined to the opinion which each juror delivers as to the weight which the evidence ought to have. To make this public, would be to deter the timid from the discharge of an important duty, by exposing him to the animosity of those who might be affected by it, and could be attended with no advantage whatever. If the office were an elective one, it would be important for the people to know how the officer had performed his duties; if it were one held by appointment, the same information would be useful to the executive or appointing power; but in the case before us, responsibility, except for offences, does not and need not exist; and where there is no responsibility, publicity can be of little use.

The want of general knowledge, and especially an ignorance of the law in the greatest number of jurors, is also alleged as a serious objection against their fitness to determine whether a citizen shall be exposed to the risk and vexation of a public trial, or a knave shall be snatched from the conviction that would probably be the consequence of his trial; and it must be confessed, that if this objection be at all well founded, it is particularly so when applied to a system like the present, in which the jurors are taken by lot. But we must consider that the

principal duty of a member of this body is the determination of matters of fact, which requires nothing more than the exercise of a plain, sound understanding, a knowledge of the different concerns in common life, an independent spirit, firmness and integrity, acquirements as probably to be met with in any twenty men, who might be selected from three times that number presented by lot, as in any particular class of society. Ignorance of the law must certainly be expected. As our laws now stand, this objection might be made with nearly the same number, chosen with the greatest care from the whole community among those who are liable to this duty. It is obviated, in a great degree, by several provisions: the duties of grand jurors are specially pointed out; and that part of the code which contains them, is directed to be read to them and a copy sent to their chamber: the written law, upon every one of the offences on which they are to decide, is also laid before them: the public prosecutor is directed to give them his advice on all the cases which he knows from the calendar will claim their attention, and on all other points, whenever it shall be required; and any further doubts they may entertain, are directed to be cleared up by the court. With these precautions to avoid error, it seems almost impossible that any of importance should be incurred; and the necessity of resorting to these sources for information, will every day be diminished by the knowledge of the laws which these measures cannot but diffuse among the people.

One other inconvenience remains to be mentioned. The abuse encouraged by the courts, and readily fallen into by grand juries,—that of assuming the power of discussing and deciding on extra-judicial and political questions. This has an unhappy effect, particularly in a popular government, where party spirit is so apt to introduce itself into every assembly, to mix in every deliberation, break the ties of friendship, relax those of kindred, embitter social intercourse, madden public discussion, and unless restrained, impress its character on legislation, and pervert the administration of the laws. The greatest of these

evils would be, that it should insinuate itself into the hall of justice ; and as far as positive interdiction can go, this entrance through the chamber of the grand jury has been closed. The grand jury, thus organized, is exclusively the accusing power in all cases of crime, and in those of misdemeanor concurrently with the public prosecutor, of whom there is one appointed for each court of criminal jurisdiction. The intervention of this body has been erroneously called a double trial, and it has been stigmatized as an injustice that the accused has not the privilege of being heard before them. Although the answer to this objection has, in some measure, been anticipated, yet it may be necessary to add, that, until the indictment be found, the accusation is not complete, consequently there is nothing to answer, and nothing to try ; and when it is found, there would be an absurdity, as well as glaring injustice, in permitting the truth of the accusation to be tried by the same body that had just preferred it.

It is hoped and believed, that in the chapters describing the mode of proceeding in the grand jury, and enjoining the duties of the court and the several officers of justice in relation to them, many things will be found which may prove useful in establishing and giving certainty to our present practice, together with some innovations that may be deemed improvements on the system, although they are not thought of sufficient importance to be here discussed. The assent of twelve jurors is made necessary for finding an indictment, but that of a majority of those present is sufficient to decide incidental questions. The act of accusation being found, must be delivered into the hands of the judge in open court, who, if the defendant be in custody or on bail, shall order it to be filed ; but if he be at large, in order to avoid his receiving notice and escaping, the judge shall issue a warrant for his apprehension, and keep the indictment in his hands until the arrest be made. Freedom from arrest, during the term of his attendance, and from action or prosecution for anything said in the performance of his duty, excepting

perjury in a deposition made to his fellows, is secured to each grand juror.

A chapter is devoted to the form and substance of indictments and informations—an important division; for, to the want of precision in our law on this subject, may be traced the numerous instances in which men evidently guilty have escaped punishment. In a system which admits the humane maxim, that it is better an hundred guilty should escape than one innocent man be punished, it becomes an imperative duty to avoid all those doubts which make the administration of criminal justice a lottery, with so many chances in favour of guilt. Every man, who has attended our courts, must be convinced of the deleterious effects of this uncertainty, and must have seen the reliance that is placed upon it by culprits on their trials. The first question asked of their counsel, especially by old offenders, is, whether he can find no flaw in the indictment; and there can be no doubt of its effect in multiplying crime, by adding one more to the many hopes of impunity. Every endeavour, therefore, has been made for giving to the provisions of this chapter such a character as will make it secure to the accused every information necessary for his defence, but deprive him of all hopes of escaping, in any other manner than by a verdict, which shall declare him innocent. Among the first, is the direction for stating clearly in the act of accusation, whether indictment or information, all the circumstances which enter essentially into the description of the offence charged, the place where it was committed, and, in private offences, the names of those to whose property, person, or reputation, the injury was offered. To render mistakes less frequent, and secure uniformity in this important part of procedure, forms are provided in a subsequent part of the work, applicable to each offence; but to avoid delay in the few cases in which these forms may have been carelessly departed from, those directions which may be considered as substantial, are designated and distinguished from those which are formal only; the latter being in the nature of mere course; and the former, except in a single

instance, not operating so as to discharge the accused, if objected to either before or after trial ; that single exception being the one that the indictment charges a fact which does not amount to an offence. In every other case, the indictment is amendable by being referred again to the grand jury, where necessary,—and the cases in which it is so are pointed out,—giving the party always time to answer the new allegations. A proper idea of all these provisions can only be formed by a perusal of the chapters which contain them. One alteration, however, demands particular notice. In no cases are exceptions to form more frequent, in none do they more effectually defeat the ends of justice, than in prosecutions for forgery, passing counterfeit bills, and other offences in relation to instruments in writing ; if an erroneous denomination be given to the instrument, by calling it an order when it is really a bill of exchange or a promissory note, or if the tenor of the writing be not exactly set forth in the indictment (*a*), the proceedings are set aside, and under some circumstance the defendant, although his guilt has been ascertained by a verdict, is discharged. These consequences are avoided by a simple provision, which has been alluded to in the Introductory Report to the Code of Crimes and

(*a*) To any one who has attended to the proceedings of criminal courts, it would be unnecessary to cite instances of the allegation in the text. One of rather a ludicrous cast lately occurred in England. In an indictment for forgery, a stroke of the pen, which occurred in the instrument, had not been copied in the indictment. The prisoner being convicted, his counsel moved in arrest of judgment, and assigned the omission of this stroke for cause. The paper and the indictment were handed up to the bench, and the judge, not being able with the naked eye to discover any difference, had recourse to a glass, and by the aid of a strong magnifier discovered something which he said was either a *tick* (a word of which I do not profess to know the meaning) or a letter, which he would not or could not determine, but submitted it to the jury, with directions, if they found it to be the one (I forget which) to convict, if the other to acquit ; and to aid in the determination of this important question, he handed them his glass—the microscopic powers of which determined them in favour of the acquitting alternative—and the prisoner was discharged : if the judge's glass had not been brought into court, or had been of a lower power, he would have been hanged ! ! !

Punishments. In all cases, to avoid the delay arising from objections to form, whether made in the shape of motions to quash the indictment, to set aside the proceedings, or to arrest the judgment, a copy of the indictment is directed to be furnished to the defendant, and, at a convenient time before the trial, he is brought into court and informed, that if the indictment contains any defect of form (and what are deemed to be such are explained to him) he must specify them by a day designated; but if he fail to make them then, he will for ever be precluded. In the mean time he has counsel assigned to him, if he have employed none. After the period for deliberation has elapsed, he is again called on for his exceptions; if he make any, and they are such as are designated in the code to be those of form merely, they are amended immediately by the public prosecutor; if of substance, the indictment is sent back to the grand jury. But if no exception be then made, none will afterwards be heard, except the radical defect that the facts charged do not amount to an offence. In prosecutions for offences, founded on writings, the indictment is not required to give any denomination to the instrument; it is not called a note, a bill, or bond, but simply an "*instrument in writing, of which a copy is annexed.*" By this means one fruitful source of error, uncertainty and delay, is avoided. Another, to which, as has been said, this species of prosecution is particularly liable, is avoided by the proceeding just detailed; the indictment and the copy of the instrument being served on the defendant, when he is brought into court the original is submitted to his inspection and that of his counsel; time is given to compare it with the copy furnished; and, in addition to the notice given in other cases, he is apprised that if he means to make any exception to the correctness of the copy furnished, he must do it in the time limited by the rule before trial. If he make any such exception, and it is found to be well taken, the copy is immediately amended; and it is not until all difficulties are removed, that the defendant is called on to answer to the merits. This is done formally in open

court, and the answer can only be a confession or denial of the charge; excepting only, the plea that the defendant has before been acquitted or convicted for the same offence. A refusal to answer, or any indirect or evasive answer, is considered and recorded as a denial of the charge. As but one mode of trial, consistently with this code, will be known to our law, the useless question, which implies an option, is no longer to be put. The trial by jury is established as the only one that can be resorted to. The reasons for this are so obvious and are so fully stated in the Report on the Plan of a Penal Code, made to your predecessors in 1822 (*a*), that nothing need be added to show the importance of this institution, as well in a political as a judicial point of view. A striking exemplification of the views contained in that Report, has lately come to my knowledge, which I think it may be proper to offer in this. The island of Ceylon, inhabited in different proportions by Hindoos, Mahometans, and descendants of emigrants from Siam, Ava, and other parts of the eastern continent and its adjacent islands, passed successively under the dominion of the Portuguese, Dutch and English, who have added to the heterogeneous mixture of inhabitants by a number of their descendants, springing from an intercourse with the native women. The English, having conquered this island in 1796, have ever since been in quiet possession of this valuable colony. For the administration of justice, the Dutch had introduced the civil law, by which the country was governed until the year 1811, when Sir Alexander Johnston, chief-justice of the island, succeeded in the bold project of introducing the trial by jury into the criminal courts of the colony. Let those who doubt the political utility of this institution—who think it fitted only for the people of highly civilized and well-informed nations—who do not appreciate its power in spreading information and elevating the personal and national character; let those, and they are not a few, who have considered the former report on this

(*a*) Report on the Plan of a Penal Code, p. 15.

subject as an effusion of an enthusiastic veneration for a vain theory ; let all those peruse the following authentic account, furnished from the highest authority, and confess the almost omnipotent power of this great institution in reforming and elevating the character, overcoming national prejudices, uniting the most discordant materials, diffusing useful knowledge, purifying the sources of justice, and demonstrating, by its effects, that no governments are so strong as those in which the people are suffered to participate. Let the enlightened author of this experiment himself explain its effects. In a letter, written by Sir Alexander Johnston to the Board of Control in the year 1815, he says :

“I have the pleasure, at your request, to give you an account of the plan I adopted, while chief-justice and first member of his majesty’s council in Ceylon, for introducing the trial by jury into that island, and for extending the right of sitting on juries to every half-caste native, as well as to every other native of the country to whatever caste or religious persuasion he might belong. I shall explain to you the reasons which induced me to propose this plan, the mode in which it was carried into effect, and the consequences with which its adoption has been attended. The complaints against the former system for administering justice were, that it was dilatory, expensive and unpopular. The defects of that system arose from *the little value which the natives of the country attached to a character for veracity; from the total want of interest which they manifested for a system in the administration of which they had no share; from the difficulty which Europeans, who were not only judges of law but also of fact, experienced in ascertaining the degree of credit which they ought to give to native testimony; and finally, from delays in the proceedings of the court.*” The chief-justice then details the remedies he proposed for these evils, which could only be removed, as he thought, by the introduction of the trial by jury. He says, that he then consulted the chief priests of the Budha religion, and the *Brahmins, as to the effect it would have on the followers*

of those religions; and having submitted his plan to the governor and council, who "thinking the adoption of the plan an object of great importance, and fearing lest objections might be urged against it in England on *account of its novelty*, no such rights as it was proposed to grant to the natives of Ceylon ever having been granted to any native of India," sent him to urge its adoption, and he most fortunately succeeded. The chief-justice then proceeds to explain the qualifications of jurors, the manner of selecting them, and of conducting the trial; all of which, though highly interesting, do not so immediately apply to my subject, as the account of the effects, which he thus details: "The native jurymen being now judges of fact, and the European judges the judges of law, one European judge only is necessary. The native jurymen, knowing the different degrees of weight which may safely be given to their countrymen, decide upon questions of fact with more promptitude. *All the natives, who attend the courts as jurymen, obtain so much information during their attendance, relative to the modes of proceeding and the rules of evidence, that since the establishment of jury trials, government have been able to find among the half-caste and native jurymen, some of the most efficient and respectable magistrates in the country.*" After stating that the saving it produces to government is at least 10,000*l.* a year, he proceeds:—"No man whose character for honesty or veracity is impeached, can be enrolled on the list of jurymen. The circumstance of a man's name being upon the jury-roll, is a proof of his being a man of unexceptionable character, and is that to which he appeals, in case his character be attacked, or in case he solicits his government for promotion. As the rolls of jurymen are revised by the supreme court at every session, *they operate as a most powerful engine in making the people of the country more attentive than they used to be in their adherence to truth.* The right of sitting upon juries, has given to the natives of Ceylon a value for character which they never felt before, and has raised in a very remarkable manner the standard of their moral feelings. *All the natives of Ceylon, who are enrolled as jurymen,*

conceive themselves as much a part, as the European judges themselves are, of the government of the country, and therefore feel, since they have possessed the right of sitting upon juries, an interest which they never felt before in upholding the British government of Ceylon." He then gives as a proof of this, their indifference in wars before this privilege, contrasted with their zeal in those after it was conferred. The writer of this interesting and highly instructive letter refers, as a proof of his assertions, to a charge delivered by his successor eight years after the experiment was tried, in which he ascribes a remarkable decrease of crimes, "*above all other causes, to the introduction of the trial by jury. To this happy system,"* he proceeds, "*now deeply cherished in the affections of the people and revered as much as any of their own oldest and dearest institutions, I do confidently ascribe this pleasing alteration;* and it may be boldly asserted, that while it continues to be administered with firmness and integrity, the British government will hold an interest in the hearts of its Singalee subjects, which the Portuguese and Dutch possessors of this island were never able to establish."

The statement of this case, tallying so exactly with the ideas I had expressed some years before the letter was written, is worth volumes of arguments, and every reflection I have given to the subject since, and they have neither been few nor cursory, has convinced me so much of the danger of tampering with so great a blessing, of injuring in the attempt to ameliorate what is so positively good, that I could not venture to propose any alterations, although some came recommended by the most plausible reasons as valuable improvements: among these was that of substituting for the unanimity now requisite to a decision, a bare majority of votes, or some other number less than the whole. The absurdity, as well as cruelty, of enforcing that unanimity, under pain of starvation, and the injustice of making the fate of the accused depend on the ability of his judges to resist hunger and thirst, seems so apparent, that, if no other remedy could have been

found for the evil, I should, perhaps, have abandoned this characteristic in the trial by jury, and adopted some of the proposed modifications, to avoid the evil. But a practice had been introduced, which, where it prevailed, in a great measure presented the remedy I sought. Courts, in the exercise of the legislative power which they held, partly by assumption, partly by the negligent permission of the branch to which it of right belongs, had gradually introduced an important change in this branch of our jurisprudence: when jurors could not agree, instead of being starved, or in some cases carted into unanimity, they were discharged; and the contest became one of argument and reason, instead of physical force and ability to resist the cravings of nature. The objections to this improvement, for such experience has shown it to be, are, that being entirely without legislative sanction, it depends on the court to determine whether it shall be introduced at all, and when it is, what degree of suffering must be undergone by the jury before they are discharged.

In the code presented to you, rules are prescribed for that purpose. The legislature speaks, and it is no longer imposed upon the court, as some decisions require, to watch, like the medical attendants on a victim of the inquisition, over the struggles between nature and famine, and to discharge the juror only when they are convinced that there is immediate danger that death will release him (a). The jurors are no longer to be kept without food; because it is not considered to be well established, that hunger will bring a man to a correct conclusion, though it may to a speedy one; and in the system I have adopted, justice is the first, and celerity only a secondary consideration. Jurors are treated like reasonable beings, and with the respect due to a co-ordinate branch with the judges in the administration of justice; subject, indeed, to their control for the maintenance of order and the

(a) 7 Johnson's cases, *The People v. Olcott*. Chief-justice Kent says, "the power of discharging a jury, in a criminal case, is a highly important and delicate trust, yet it does exist in cases of extreme and obstinate necessity." See the other cases there cited.

advancement of justice, but to a legal control, not an arbitrary discretion; their deliberation must be free from the restraint of physical wants—their determination the result of reason and conviction. Perhaps, too, the concurrence of circumstances (*a*), that probably produced the extraordinary feature in this mode of trial, which requires unanimity for a verdict, has been more fortunate than design would probably have been, in adapting it to the ends of justice in criminal proceedings; for I am inclined to think, if a bare majority were sufficient to give a verdict, that in a secret consultation, where there is no excitement created by the presence of auditors or by the prospect of publicity, the decision would, for the most part, be made merely by ascertaining the number of members on each side, without that discussion which is so necessary to elicit truth. Indeed, I have been told by those who have served frequently on juries, and I have made the inquiry in different states, that the first thing generally done, after they retire, is, previous to any debate, to take a vote on the question, and a division of opinion always, under the present system, leads to a revisal of the testimony and a discussion of the arguments that have been offered; whereas, if a majority were to decide, the vote would have decided the cause. Another consideration, also, must have some weight in favour of the verdict by unanimity: the evidence that subjects a citizen to the serious consequences of conviction for an offence, ought to be so clear as to convince the understandings of all; if then it should fail to convince one-fourth, or any other given proportion of the jury, the probability is, that

(*a*) It has been conjectured (and I think with reason) that the unanimity afterwards required formed no part of the primitive institution of juries, which originally, it is argued from the analogy of grand juries, the grand assize and sheriffs' inquests, must have consisted, like them, of twenty-three, a majority of the whole number (twelve) being necessary for a decision; that afterwards, at some unknown period, probably when suits began to multiply and the attendance of so many jurors was found burdensome, the practice of summoning only twelve was introduced, but that the concurrence of the same majority of twelve continued to be

its impression would be the same on the rest of the community ; and the conviction of a man, whom one-fourth or one-tenth of his fellow-citizens believed to be innocent, could not but have effects upon the confidence which ought to be reposed in the administration of justice more injurious than his acquittal could be, if, although really guilty, he should be pronounced innocent by a unanimous verdict. Reverse the case, and suppose three, or two, or even a single one, of the jury so perfectly convinced, from the evidence, that the defendant has committed the crime, as to be ready to attest his conviction under the sanction of an oath, and consequently refusing to join in the verdict of acquittal, while the rest of the jury doubt his guilt or even believe him to be innocent : to acquit him under such circumstances, would neither restore him to society with the pure reputation that every man, who has been pronounced innocent by his fellow-citizens, ought to enjoy, nor would it remove the alarm which his enlargement would create in a community, a large proportion of which still believed him guilty, and, of course, encouraged by impunity, ready to repeat his former crime. Thus, whether we consider the effect of an acquittal or conviction by less than the whole number of the jury, upon the community, or the accused, upon the administration of justice, or its reputation, we find nearly the same objections to making any change. If the defendant is acquitted, he returns with a tarnished reputation, and the community is not relieved from their alarm. If he is convicted, the chance of his being innocent is increased in proportion to the number of the jury who believed him so ; and the same proportion of his fellow-citizens participating in this belief, will arraign the justice of their country, and consider him upon whom it has been exercised as an innocent victim, not a guilty object of just punishment. In the actual administration of the laws, we have seen the effect it will produce, of a reliance upon first and cursory impressions, a neglect of due discussion, and a careless decision by shifting the responsibility upon a majority, who act in secret, and whose names are not distinguished from those of their

fellows. Where all convict, or all acquit, there is responsibility; upon a secret majority there is none; and to make them record their names and votes, or to give publicity to all their deliberations, would be attended with inconveniences too obvious to be detailed. However just in itself, no system of criminal procedure can be good which does not create in the mass of the people a belief that he who is acquitted under it is innocent, and that no punishment can be inflicted but on the guilty. This belief constitutes the reputation of judicial proceeding, and it is as necessary to this branch of government as good character is to individuals; but we have seen that it will be greatly impaired by any other course than that of requiring unanimity in the jury that decides in criminal cases. It is not my intention to discuss its propriety in those of a civil nature further than to say, that most of the reasons I have urged will not apply to the latter. I have dwelt longer on this subject than I should have done, if I had not found a disposition in the friends of this institution to rest the defence of this particular feature on its antiquity, rather than its wisdom or its use; and in its enemies, to urge this characteristic as an unanswerable objection to the jury trial in its present form. The legislature will judge whether it has been wisely preserved or not. This discussion has rather anticipated on the regular course of this review, the natural order of which is to follow that of the different chapters of the work; one, which has before been cursorily mentioned is connected with the subject we have just left: it regulates the manner in which the grand and petit juries are to be selected—in such a way as to equalize the duty upon all the citizens capable of performing it, and rendering it the means of a gradual diffusion of legal and political information through the whole community. The designation is on the principle, now in such successful operation, of a mixture of chance and selection, which precludes the possibility of any favour in empanelling the jury, and gives little or no opportunity for influence after they are

The seventh chapter of this title lays down rules for proceedings in court, previous to the trial. The first section gives to the court the discretionary powers of postponing the trial, whenever such circumstances are made to appear, by proper proof, as show that justice requires it, but with the limitation that the defendant, if in custody, must be tried before the end of the second, or, if on bail, before the end of the fourth term, unless the delay has taken place at his instance, or by his fault.

After all the precautions given by the mode of empanelling the jury, it may happen that the forms presented by law, for returning and selecting the jurors, have not been observed; that one or more of them may not be legally qualified to serve on any jury—or, by reason of interest, partiality, relationship, or some other cause, disqualified to be on the one for which they are drawn. To secure that impartiality which is so essential to justice, the law has provided remedies adapted to each of these cases; they are taken, with but little alterations, from the English law; the technical terms are preserved; but the challenge to the array can, under this system, only be made for a single cause, that the forms of the law for forming the panel have not been followed. Where the names were selected from the community at large, at the discretion of the returning officer, his interests, enmities and connections with the party, formed so many reasons for making this challenge; all of which are avoided by our mode of making out the panel. Exceptions to particular jurors remain nearly as under the English law. The peremptory challenge, for which the party need assign no reason, is a wise and humane provision, peculiar, it is believed, to the English jurisprudence. There are, in life, so many unfriendly feelings, created by trifles, or for reasons which it would be difficult to assign, but which destroy the perfect impartiality required in a judge, that we cannot too much admire the provision that enables a party to reject him who may be affected by these feelings, without being questioned as to his motive. Considering the little chance there is, under our plan of

preparing the panel, that any great number of persons unfavourably disposed to any individual accused could be found on it, it was thought that giving the privilege of challenge to nine jurors peremptorily, was a sufficient extension. The public prosecutor has the same right, but extended only to three jurors ; the reason for this restriction is obvious ; the prejudice against the public can be supposed, and the only undue affection of the mind to be guarded against by the prosecution, is favour to the defendant, which, if made apparent by evidence or by the declaration of the juror, is a disqualification under another head,—the challenge for cause ; this may be made both by the defendant and the prosecutor, and, of course, has no restriction as to number. The reasons for which it may be made, are set forth at length, and embrace every fact or opinion that can show the slightest bias for or against the prisoner ; and the mode of trying the facts which evince this bias, or the disqualifying operation they may have on the jurors, is prescribed.

The next chapter, which directs the mode of proceeding on the trial, contains some provisions which call for attention. The jurors are drawn by lot, not in the order they stand on the panel ; a different practice had obtained in our courts, which it was thought proper to correct, being a deviation from the English law, and liable to obvious abuse. Any number of jurors, less than twelve, that may be agreed on between the prosecutor and the defendant, may try a misdemeanor, for the purpose of avoiding delay in causes of little importance, wherein a speedy decision may sometimes avoid inconveniences greater than the punishment of the offence, if the party be found guilty ; but it is not allowed in cases of crime, in which the party can neither renounce the trial by jury, nor modify it, for reasons which have been already stated at large. The order in which the case is opened to the jury, and the proof introduced, is the same as that now in use ; but a material change is made, by giving the closing argument to the defendant. It was thought that this was proper and just, because it is an *advantage*, that is to say, a

benefit to one party, that the other does not and cannot, from the nature of things, enjoy. To whom shall this be given, to the accuser or the accused, to him who asserts or him who denies? Humanity and justice seem to dictate the answer. Every address to a judge must be supposed to contain a new allegation of fact, a new argument, or a new answer to rebut those which have been offered on the other side; to close the debate, therefore, without suffering the accused to reply to such allegation or argument, would be in so much as regards it, to decide on his case without hearing him. The same thing may be said of the prosecution. The remedy would be to suffer the argument to go on until both parties declared they had nothing further to say; but this would rarely happen, and never until the discussion had been protracted to a length so highly inconvenient as not to be permitted. It seems, then, as has been said, that the nature of the case imposes the necessity of giving this advantage to the one party or the other. To give it to the prosecution, sometimes defeats the ends of justice, by enlisting the feeling of humanity on the side of the accused. There is in human nature, when not perverted, a feeling repugnant to oppression, which generally supposes power to be wrong, and ascribes innocence to weakness whenever they come in competition with each other; and few cases give such scope to the imagination to exert itself in this way, as that of a criminal on his trial—squalid in his appearance, his body debilitated by confinement, his mind weakened by misery or conscious guilt, abandoned by all the world, he stands alone, to contend with the fearful odds that are arrayed against him. It is true he has counsel assigned him; but here again the same feelings operate to lead the judgment astray. This counsel is generally the youngest counsellor at the bar, who is thus made to enter the lists with one of the highest abilities and standing, with a reputation so well established as to have made him the choice of government as the depository of its interests. If you add to all this, the decided advantage of the closing argument, given to a practised advocate, whom long habit has

taught to avail himself of every weak argument or suspicious fact, and a zeal in the performance of his duty has taught to believe it proper to do so ;—do this, and of two opposite effects one must be produced, both injurious to the fair administration of justice : either the jury will be swayed by the sentiment I have endeavoured to describe, and feel an undue bias in favour of the prisoner ; or if this fails to act, the last impression, given with the force of eloquence and professional skill, may, in doubtful cases, have injurious consequences to the innocent. But give the last word to the accused, and you will do little more than counterbalance the disadvantages inseparable from his situation ; while, by this show of humanity and disdain of using the power in your hands, you neutralize the sentiment that would otherwise be felt in his favour. The provision here recommended makes part of the French code of criminal procedure, and it is said to have, in practice, the most beneficial effects.

Another change, of the same character with the one last mentioned, was noticed in the Report on the Plan of a Penal Code made in 1822 (a), which received the unanimous approbation of the legislature ; yet it has been made the ground-work of an attempt to prejudice the public mind against the work and its author, as if it were a design to lessen the dignity of the judiciary branch of our government, suggested by a spirit of hostility to that department, or of personal enmity to those who fill it. To repel this is necessary, in reference both to the objection itself and the motives that are imputed.

A system of penal law, containing principles or provisions injurious to the power upon which alone it must depend for its execution, would be an absurdity too gross even for imbecility to produce ; and before it is fixed on the code I have now the honour to offer, it ought to be strictly examined. The obnoxious article is in the following words (b) : “ When the pleadings are finished, the judge shall give his charge to the jury, in which he shall state to

them all such matters of law as he shall think necessary for their information in giving their verdict ; but he shall not recapitulate the testimony unless requested so to do by one or more of the jurors, if there should be any difference of opinion between them as to any particular part of the testimony, and then he shall confine his information to the part on which information is required ; being the intent of this article, that the jury shall decide all questions of fact, in which is included the credit due to the witnesses who have sworn, unbiassed by the opinion of the court." This is the text. I add the reasons as they are given in the first report, that the legislature may see whether the provision was not dictated by the exalted opinion of the judicial character, which, in its purity, it deserves ; by a desire to prevent any encroachment by the bench on that feature in our jurisprudence which assigns to the judges the decision of questions of law, to the jury those of fact ; and whether in its operation it will not save the judges from degrading altercation, render juries more independent and more attentive to their great duties, and exalt rather than debase the judicial character, and preserve unimpaired the distinctive characters of the jury and the bench.

This is the extract from the Report. "Another article, applicable to the trial, restricts the charge of the judge to an opinion of the law, and allows a repetition of the evidence only when required by the jury, or any one of them. The practice of repeating all the testimony from notes, always, from the nature of things, imperfectly, not seldom inaccurately, and sometimes carelessly taken, has a double disadvantage ; it makes the jurors, who depend more on the judge's notes than on their own memory, inattentive to the evidence, and it gives them an imperfect copy of that which the nature of the trial by jury requires they should record on their own minds. Forced to rely upon themselves, the necessity will quicken their attention, and it will be only when they disagree in their recollection that recourse will be had to the notes of the judge. There is also another and more cogent reason for the restriction.

Judges are generally men who have grown old in the practice at the bar. With the knowledge which this experience gives, they also acquire a habit, very difficult to be shaken off, that of taking a side in every question that they hear debated ; and when the mind is once enlisted, their passions, prejudices, and their professional ingenuity are always arrayed on the same side, and furnish arms for the contest ; neutrality cannot, under these circumstances, be expected ; but the law should limit, as much as possible, the evil that this almost inevitable state of things must produce. In the theory of our law, judges are the counsel for the accused ; in the practice, they are, with a few honourable exceptions, his most *virulent* (a) prosecutors. The true principles of criminal jurisprudence require, that he should be neither. Perfect impartiality is inconsistent with these duties. A good judge should have no wish that the guilty should escape, or that the innocent should suffer ; no false pity, no undue severity should bias the unshaken rectitude of his judgment ; calm in deliberation, firm in resolve, patient in investigating the truth, tenacious of it when discovered ; he should join urbanity of manners to dignity of demeanour, and an integrity above suspicion to learning and talent ; such a judge is what, according to the structure of our courts, he ought to be—the protector, not the advocate, of the accused—his judge, not his accuser ; and while executing these functions, he is the organ by which the sacred will of the law is pronounced. Uttered by such a voice, it will be heard, respected, felt, obeyed. But impose on him the task of argument, of debate ; degrade him from the bench to the bar ; suffer him to overpower the accused with his influence, or to enter the lists with his advocate, to carry on the conflict of sophisms, of angry argument, of tart replies, and all the wordy war of forensic debate : suffer him to do this, and his dignity is lost, his decrees are no longer considered as

(a) The conduct of some judges would justify this epithet ; but, on reflection, I regret that it has been so generally applied as is done in the text ; *zealous* would have better expressed the idea I meant to convey.

the oracles of the law; they are submitted to, but not respected; and even the triumph of his eloquence or ingenuity, in the conviction of the accused, must be lessened by the suspicion that it has owed its success to official influence and the privilege of arguing without reply. For these reasons the judge is forbidden to express any opinion on the facts which are alleged in evidence, much less to address any argument to the jury; but his functions are confined to expounding the law, and stating the points of evidence on which the recollection of the members of the jury may differ."

In speaking of the formation and functions of juries, the greater part of that which relates to verdicts, the subject of the next chapter, was anticipated. Some articles deserve consideration. The term, *offences of the same nature*, frequently occurs in this system, and it is important to keep in mind the sense in which it is declared to be used. Offences, we must remember, were arranged in relation to this object under a variety of heads; as offences against person, property, reputation, and the like. All offences arranged under the same head, are offences of the same nature. of these, some are higher, others lower in degree; the lowest being the first in numerical order, and ascending on a scale prepared by a view of the injurious effects of each offence combined with the degree of moral depravity evinced in, or usually attendant on, its commission. This explanation is necessary to an understanding of the power, given to the jury, to find the defendant guilty of a lower offence, of the same nature with the one charged in the indictment, provided that the lower offence be produced by the same circumstances; thus, if one be indicted for murder, the jury may convict of manslaughter or negligent homicide in any of the degrees; if he be indicted for battery or theft, aggravated by any other circumstances which enhance the guilt of the offender, the jury may convict of any of those offences of the same nature, which are lower in the scale of crime; but it must be the same homicide, the same battery, the same theft, that is charged in the indictment. On the contrary, on an indictment for

negligent homicide in the first degree, the party may not be convicted of manslaughter, murder, or any of the other degrees of homicide; nor, if indicted for simple theft, can he be found guilty of robbery; but if on the trial the evidence is found to support a charge of a higher degree than the one set forth in the indictment, the court is directed to discharge the jury and send the witnesses to the grand jury, for the purpose of having an indictment preferred for the higher offence.

In cases of acquittal for insanity, that fact is directed to be certified, and the court is empowered to take proper measures for the confinement of the party or his delivery to his relations.

In the mode in which verdicts are taken, at present, on charges of forgery, a difficulty sometimes arises, where there is an acquittal, to know on what grounds the decision was made; whether they believe that the instrument was forged, but that the defendant was not the person guilty of the crime; or that the instrument was made by the person whose act it purported to be, and consequently that no crime had been committed. By the code, whenever the acquittal is made on the last-mentioned ground, the jury are directed to declare, and the court to record it; so that the finding may serve as an authority for the person, whose property the instrument is, to receive it. In the first case, it remains in the hands of the proper officer as the means of prosecuting the offender, whenever he is discovered. But the court is authorised to make such order respecting it, as may be required for the ends of justice, in case any civil suit should be commenced which may make its production necessary.

In cases of conviction, if the court think the jury have mistaken the law, they may order them to reconsider their verdict, after giving them an explanation of the law; but they have not this power given to them where there has been a verdict of acquittal. Directions are given for ascertaining whether the assent of each juror has been given to the verdict declared by the foreman, and for recording it. When the verdict of acquittal is entered and recorded, the

defendant is entitled to his immediate discharge, without any detention for fees, costs, for any expenses incurred by his confinement, except only in the following cases : where other charges are legally exhibited against him ; where the public prosecutor requires a detention not exceeding twelve hours, to frame such charge on an official allegation to the court, that he has the evidence to justify it ; or on the allegation of sufficient causes for a new trial if properly supported by evidence. The causes that are deemed sufficient are precisely enumerated, and all are founded on some malpractice of the defendant, in producing suborned witnesses, or forged papers—in preventing, by fraud or force, the attendance of the witnesses for the prosecution—in giving evidence out of court to the jury—in bribing a juror, or causing an illegal panel to be returned. A much longer list of sufficient reasons is given for setting aside the verdict when it is one of conviction ; and the mode is pointed out by which the facts, in either case, are to be substantiated. The long title of arrest of judgment, under our present system, is abridged to a short chapter ; and all the causes for which the defendant may now hope for impunity, after his guilt has been ascertained, are reduced to a single one—that the act of accusation does not contain the allegation of any fact ; or any fact coupled with an intent, that is by law created an offence. But the allowance of the motion in arrest of judgment, only places the party in the situation in which he was before the indictment was found—liable to be again indicted, if the evidence is sufficient for that purpose. If the code has been supposed too favourable to the accused, in some of its features, it has, on the contrary, been considered as too severe in this ; but after the best reflection my mind has been able to give to the subject, it can perceive no injury but to the guilty in thus restraining the effects of allowing a motion in arrest of judgment, nor any unnecessary vexation even to them. Suppose the case of one brought to trial on an indictment which charges facts that do not amount to an offence ; if this defect had been pointed out before the trial, no one supposes that it ought to operate

as a discharge from further prosecution. Why should it, after a jury have given their sanction to the truth of the facts, and after the defendant has purposely, perhaps, omitted to avail himself of the exception? No good reason can be alleged: even the maxim that no one shall twice be put in jeopardy, perverted as it has been, cannot be brought to bear on the question; for surely no one can be said to be put in jeopardy by a trial for facts not criminal in themselves, and which he might have confessed without incurring any penalty whatever.—Three days, after a verdict of conviction, are allowed for making a motion in arrest of judgment or for a new trial; at the expiration of which time, the prisoner is to be brought into court for sentence: previous to pronouncing it, the prisoner must be interrogated to know whether he can allege any cause why judgment should not be given. The several matters which it will avail him to show in answer to this interpellation are only four: a pardon—insanity—inevitable accident, that prevented a motion for a new trial or in arrest of judgment within the three days—or a denial that he is the person convicted. The mode in which these several allegations are to be substantiated and disposed of is pointed out; and previous to the sentence it is provided that such matters in aggravation, as were not necessary to be stated in the indictment, may be shown by the prosecution—and such in extenuation, by the defendant, as would not, on the trial, have proved him to have been entirely innocent.

Before we consider the matters incident to the judgment, it may be proper to review the provisions which characterise the previous proceedings, and which were framed with the view of depriving offenders of every reasonable hope of escaping from defects of form, an inestimable advantage in criminal procedure; but which would be purchased too dear if attained at the expense of unnecessary risk to the innocent, or any vexation that may be avoided to the party, whether guilty or innocent. As the law is now administered, there is a certain class of ~~defects~~ ^{defects}, not very clearly defined, which are called defects

of substance ; for these the defendant may move to have the indictment quashed, that is, declared to be void, before the trial ; or he may take the chance of a verdict in his favour, and if that hope fail, he may move to arrest the judgment after a verdict against him. This latter course he is always advised to pursue, if his advocate thinks the objection a good one, because the effect of quashing the indictment leaves him liable to a renewal of the prosecution ; but when the judgment is arrested, he is for ever discharged, although his guilt be apparent. Now, most of these things, called defects of substance, are in reality nothing more than mere defects of form. Sometimes the omission of writing the name of the county in the margin of the indictment, although it be stated in the body of the instrument itself ; sometimes not putting it in the indictment, although it be in the margin, and other omissions of the like nature ; the variance of a letter between the original and the copy of an instrument set forth in the indictment ; sometimes even of a comma, has been held a sufficient cause of setting aside a conviction and discharging the guilty convict without punishment. In England and in this state, which, as we have seen, are governed as to certain crimes by the same law, any defect of form whatever may produce this effect. I say *may* produce it, because this, like other points of practice, depends very much on the will of the judge ; the law having varied in this respect, not by the act of the legislature, but by the changing decisions of the courts ; for Sir M. Hale laments, that "that strictness has *grown* to be a blemish and inconvenience in the law and the administration thereof ; for that more offenders escape, by the over easy ear given to exceptions in indictments, than by their own innocence." Here we have the highest authority, not only for the existence of the evil, but for the fact of its being produced by the decisions of the court, not by any positive law ; and consequently, if one set of judges have altered the law by being over easy in listening to exceptions, other judges may restore it to its original state in which it was before the "strictness grew to be a blemish," or they will have

a plausible, if not a legal reason for increasing that strictness, because it is expressly stated to be law (*a*), that none of the statutes, which allow amendment in civil cases, extend to those of a criminal nature. It is of little consequence, however, to inquire from what cause this strictness, so injurious to the administration of justice, proceeds, provided we guard against its effects in future. This has been attempted not by abolishing the necessity for forms, but by supplying them whenever they have been omitted, and amending them when they are defective. The general enunciation of this feature in the code was so much assailed by the allegation, that allowing the amendments would enable the prosecuting officer to harass by charges that might surprise the defendant to his vexation and injury. An inspection of the provisions by which this characteristic in the plan is to be carried into execution, it is confidently believed, will obviate that objection; no amendment materially altering the charge can be made, but either by the agency of the grand jury, which would never lend itself to vexatious proceedings, or by the act of the defendant himself, when he points out an error arising from misnomer, inaccurate copies, or defects of this nature. Innocence has nothing to fear, nothing to complain of, from this proceeding; guilt, everything to dread; public justice, everything to gain. I consider the adoption of this part of the code so essential to the success of the whole, that I must be excused for pressing the strict examination of it upon the attention of the legislature. Nothing so much fosters the growth of crimes, as the hope in the culprit that some defect of form will enable him to escape; and nothing encourages that hope so much as the numerous and sometimes frivolous objections that are allowed; and this is called the tenderness and humanity of the law!—when, in fact, it is, in the words of Sir Matthew Hale, its “greatest blemish and inconvenience.” The character of humanity must be acquired, not by facilitating the impunity of

offenders, but by the strict infliction of mild punishments, when guilt has been proved ; and it is a strange tenderness to boast of, which suffers a villain to escape his punishment because a clerk has omitted a word, or inserted one too many, in copying an indictment.

We come now to the consummation of the judicial authority in its operation upon offences. The functions of the judge cease when he has pronounced the sentence, unless extraordinary circumstances should require him to communicate with the chief magistrate, in relation to an application for pardon ; but even then, the duty he performs is that of a witness of facts disclosed on the trial, rather than that of a judge. This last office is also the most important. In a system of penal law, which has fine and imprisonment for its chief sanctions, a great scope must be allowed for the discretion of the judge. The circumstances which aggravate or extenuate an offence, which make a punishment ruin to one individual which would not be felt by another, are too numerous to be detailed, and too much dependant on events to be foreseen. But much may be done, although we confess our inability to do all, and we ought to advance in the path of improvement, although we despair of its leading us to perfection. We have prescribed limits to the discretion of the judge, because we cannot fill up the interval by applying our scale to unknown events. The combination of those events may produce different degrees of depravity for which we cannot anticipate the exact punishment that ought to be applied ; but we can foresee and can enumerate certain probable circumstances in the commission of every offence, which ought to aggravate or lessen the punishment, although we cannot direct in what precise degree they ought to have that effect. This has been done in the code now offered to you. It contains two opposite details of circumstances, which ought to increase above, and those which ought to diminish below the medium rate of punishment, which is declared to be that which ought to be inflicted where none of these circumstances exist. Thus, if the code direct that the punish-

ment of an offence shall be fine, not less than one hundred nor more than three hundred dollars ; the medium is two hundred, which it is the duty of the judge to award, if there be no circumstances of extenuation or aggravation. The nature and extent of the obligation arising from this address to the judgment of the court, is fully explained in the text, and the reason for resorting to it has more than once been adverted to in the report.

The fourteenth chapter is devoted to the forms of conducting the ordinary business of courts. One of the most important of these, is the oath or affirmation to be administered to jurors and witnesses ; those now in use to officers, are, for reasons that will be given, abolished. These engagements are either promissory or declaratory ; the juror's oath being of the first, that of the witnesses of the last description : a breach of the promissory oath not incurring, like that of the other, the punishment of perjury, as we have seen in the Penal Code. Some changes having been proposed under this head, it will be necessary to make a brief statement of the reasons which have produced them. The necessity of providing some test for the truth of declarations which were to operate as judicial proof, and some bond for the performance of promises, in a very early state of society, suggested, on him who should be guilty of a breach of such engagement, an imprecation of divine displeasure ; which was thought to be inevitable, when the appeal was voluntarily made by the party upon whom the vengeance of heaven was to fall, if his promise was broken, or his declaration false. A belief in a Supreme Being, and in his agency in punishing evil and rewarding virtue, either in this life or another, was essential to this religious sanction of an oath ; as it was the first, so it has generally been esteemed the most powerful ; another, however, may be said to be inseparable from the first. The sacrilegious wretch, who had by his broken vows incurred the vengeance of God, could not retain the good opinion of man, and another surety was added in the loss of reputation, which would be incurred by the perjurer. The chastisement which he had invoked upon his head, was

observed not always to follow his guilt in this world, and the fear of that which might follow in the world to come was weakened by doubt, by irreligion, and the prevalence which present advantage generally has over distant and uncertain evil ; and it became necessary to add the temporal penalties denounced by human laws against perjury ; thus completing the triple tie of the religious, honorary, and civil sanctions to the obligations of an oath. Some sects, from religious principles, and some writers, from a specious theory, have rejected the religious sanction : the first, because, according to their tenets, it is contrary to the express precept of the founder of our holy religion ; the second, for reasons which it may be useful to examine. Religious scruples will with difficulty yield to civil laws, and where their indulgence does not operate any great evil to society, a wise legislator will not attempt to overcome them. Throughout the United States, therefore, those Christians who cannot conscientiously take an oath, have the same credit given to their affirmation ; which derives its whole force from its civil and honorary obligation. Those who are for abolishing the religious sanction, say, that it is not only useless but injurious, and even profane : useless, because where religious motives produce a determination to tell the truth, they will always operate, whatever be the form of the engagement—and where there is no religion, the form can have no effect. Injurious, because it creates a false confidence in the declaration of one who has no religious sentiment, and adds nothing to the credit of him who has ; because religion cannot be introduced in civil institutions without weakening their effect ; because, with many, religion consists in form, and if that form be varied in the slightest degree, the religious obligation is not incurred, and the other obligations, being considered as inferior, are overlooked ; and because the oath, being a religious ceremony, was subject to ecclesiastical control, might be dispensed with, and its breach pardoned or expiated (a). Profane, not only because it is in opposi-

(a) Dumont gives an extraordinary instance of this power. Clement VI., he says, granted to John III. of France, and Jane his wife, and to all

tion to the plain and express command of the Scripture, but because it supposes a power in him who imposes, or him who takes the oath, to direct Almighty vengeance at his pleasure, and often for trifling or even unworthy objects. When properly developed and coolly considered, these objections have weight ; and if I were now, for the first time, devising the formula of a judicial asseveration to declare the truth, I think I should omit the conditional renunciation of God's favour, which it now contains. The general impression now existing of its necessity, the abandonment of all pretension to right by any ecclesiastical power in our day to dispense with its obligation, and the danger of a sudden change, have combined to induce me to retain this part of the oath in ordinary cases ; but with the proviso of extending the right of dispensing with it in favour of all those who declare they have religious scruples, in the same manner that the same dispensation is now given to Quakers and Memnonists. But while this part of the form has been retained, it was to be feared, and experience shows that there is some ground for the apprehension, that there are men who do not feel the force of this obligation, and are ready to risk the legal consequences, but who yet might be restrained if an address were expressly made to their honour and integrity. There are perverse and extraordinary ideas entertained on this subject : one will conceive the oath not binding on his conscience, if administered on any other book than the New Testament ; a Jew may think it of no force unless the Old be presented to him ; this man conceives himself obliged to tell the truth only when he declares that he will do so with uplifted hand ; another, who does not mind kissing the book, as he irreverently styles it, will be scrupulously exact in what he declares upon his honour. These considerations have induced me to incorporate into the form of the oath a clause to bind those of the last description.

their successors, the right, without incurring any sin, to violate their promises and oaths, as well those they had already made as those they might thereafter make, provided it was not their interest to keep them, and provided also that they commuted the obligation in some work of piety.

As has been observed, all persons belonging to any sect, having religious scruples to take an oath, may substitute an affirmation. The declaration of the party that he does belong to such sect is sufficient evidence of the fact; and although that declaration be untrue, the breach of the affirmation carries with it the consequences that the breach of an oath would have done.

A clause is added to the affirmation referring expressly to its legal sanction.

To avoid the frequent repetition of oaths, in judicial proceedings, none are administered to a sworn officer when called on to do a particular duty, such as going out with a juror, or the like.

To give greater solemnity to the obligation, the form is repeated by the person to whom it is administered, during which strict silence is to be observed by all those not concerned in taking or administering it, and no other business is to be transacted in court during the ceremony. The oaths and affirmations of jurors and witnesses are so framed, as to bring their respective duties forcibly before them, as well as the penalties attending a neglect of their performance; and an endeavour is made to enforce the necessity of preserving the requisite solemnity in a ceremonial generally treated with the utmost levity, but which requires every aid that an imposing form can give to enforce the idea of its obligation. One peculiarity in the oath of a witness ought, perhaps, to be pointed out. At present he is sworn to declare the "*whole truth*," yet when he proceeds to comply with this obligation, he is, perhaps, stopped by the counsel or the court, and told, "what you are now about to say is not legal evidence, and although it is part of the truth, the whole of which you have sworn to tell, yet you are not permitted to tell what we have obliged you to swear that you would tell." This incongruity is remedied by a clause in the proposed form of the oath.

The three remaining sections of this chapter regulate the manner of opening and adjourning the court, keeping the minutes, calling the jurors, witnesses and officers, and

imposing fines for their non-attendance ; and to supply any mission in this part of the code, authority is given to the courts to make additional rules of practice ; but they are to be submitted immediately after to the legislature, to the end that they may prevent any infringement of the law, and preserve a uniformity in the form of proceeding in all the different courts.

The necessary officers of the courts are enumerated in a succeeding chapter, and their several duties specially pointed out. The only addition to those now employed, is the reporter ; his duties are, to make reports of all causes that are tried, and all points of law that are determined in the court, and to publish them at stated times, and to make regular returns of all commitments, accusations, indictments, informations and trials, in such form as to give every desirable information of the state of crime and criminal jurisprudence in his district. These returns are to be made to the governor, to be by him laid before the legislature. A mass of information will thus be collected, which will be of the utmost value in future legislation (a).

Although publicity is of the highest importance in the administration of justice, yet public morals require that certain investigations should form exceptions to this rule. A chapter, therefore, provides that, in certain enumerated cases, the details of which would only foster passions injurious to society, or wound the feelings of the innocent connexions of the parties, no persons but the necessary attendants and officers of the court, the witnesses, jurors, and a limited number of persons indicated by the party and the prosecutor, shall be admitted at the trial, and that no report of the details shall be published.

A short chapter directs, that until the system by which magistrates and officers of justice are remunerated for their services, by the payment of fees, be abolished, the state, and not the defendant, shall pay costs in all cases of dis-

(a) Both in France and in England these returns are considered as of the highest importance, and the greatest pains are taken to make them as minute as possible. The tables of the state of crime in France, are more perfect in their form than any that have any where been produced.

charge for want of prosecution, or on acquittal ; and that, in cases of conviction, the court may either exonerate the defendant from the payment of them, or make such an apportionment as may suit the circumstances of the case ; and no person is to be detained for the payment of costs, until after a discussion of his property, and then only for the term limited in the case of fines.

This finishes the review of that part of the code which prescribes the ordinary course of procedure in criminal trials. The concluding chapter of this title relates to a subject which could not be brought properly under any of the preceding heads.

The propriety of allowing any lapse of time to prevent the prosecution of an offence has frequently been called in question, and for such cogent reasons as have induced the allowance of prescription only in the following cases ; misdemeanors for private offences ; crimes which can only be prosecuted on the complaint of designated persons ; attempts to commit crimes when not accompanied by any offence. This plea is allowed in the first case, because, the evil of the offence falling chiefly on an individual, it must be presumed to have been too trivial to attract the notice of public justice, if it be not prosecuted within the limited time ; but this presumption is rebutted by showing that the party injured was out of the state, or prevented by force or threats from making the complaint. The same reason partially applies to the second case, crimes, which can only be prosecuted by designated persons ; as the prosecution could only be made by them, the delay will be presumed to have arisen either from a determination not to accuse, or for the purpose of taking some unfair advantage. The same causes that are enumerated under the third head destroy the prescription ; attempts to commit crimes are prescribed, because they approach so nearly in their nature to private misdemeanors, which enjoy that privilege, that it appeared unjust to make any distinction ; but chiefly because, no offence having been actually committed, and the sole question being that of intent, great injustice might ensue from instituting an inquiry of that nature, after a

lapse of many years. All other offences may, at any time, be prosecuted, because allowing them to be barred would hold out a reward to ingenious villany and address in concealment; and, as (*u*) has been very forcibly expressed, to show the absurdity of suffering any lapse of time to bring impunity, only suppose the law conceived in these terms, "but if the robber, the murderer, the thief, can during twenty years elude the vigilance of justice, their address shall be recompensed, their safety assured, and the proceeds of their crime legalized in their possession."

The third and last title of this book contains directions for the mode of procedure in cases not immediately connected with the procedure in courts. The first chapter relates to inquests on dead bodies, found under circumstances that may induce the suspicion of homicide. These do not materially vary from those now in use. The utility of this institution is apparent, and has been tested by experience. The publicity of the proceeding destroys unjust suspicion, which, but for this inquiry, the innocent would have no means of showing to be false; and it is eminently calculated to bring the guilty to punishment. The inquiry immediately made, before any means can be devised for concealment, the view of the body, the examination of skilful professional men, the power to compel the attendance of witnesses, and the concourse of neighbours and friends, bringing with them proof of circumstances that would escape any more tardy or less public inquiry, are most powerful means for bringing to light crimes often committed against human life. The inquest, however, has not, as in England, the effect of an indictment, because the want of time and professional aid frequently render it defective; but it may be made the foundation for one, and, with all the proceedings, is to be laid before the grand jury, in all cases where death is found to have been occasioned by a crime. The coroner has the same powers conferred, and duties enjoined, as belong to other magistrates, in cases of examination, bail and commitment.

The second chapter regulates the mode in which the examination of a body shall be made in cases of suspected murder. It gives the power to a family meeting, or to a magistrate, and directs the manner of proceeding in the investigation. There are no provisions in our law on this subject, but it is deemed one that required legislative attention.

The fraudulent appropriation of property found, being created an offence, distinguished from theft, with which it is frequently confounded, by extending the doctrine of constructive possession, it was thought just and requisite that the law should direct the honest finder in what manner to proceed, with respect to the property found, so as to avoid unjust suspicion, by observing the rules, and to facilitate the conviction of the dishonest by his breach of them : this forms the subject of the third chapter.

The fourth directs the mode in which vagrancy may be proved, and under what circumstances vagrants may be committed to the House of Industry. This class of men, who hang on to society rather than belong to it, although not absolutely criminals, are yet so near the verge of it, and are so generally the nursery for criminals of every description, that preventive justice is forced, with respect to them, to measures not strictly in unison with its usual course ; but this subject will be so fully discussed in the Introductory Report to the Code of Prison Discipline, to which it properly belongs, that the legislature are respectfully referred to that part of the system, as well for the measures recommended for the employment, restraint and reformation of those people, as for the reasons which suggested these measures.

In criminal proceedings, no question presents itself which is, at times, more difficult of solution, or more important to be accurately answered, than that of alleged insanity. When it occurs as a defence on a trial of the merits, little more need be provided by law, than to direct, that when ascertained to have existed at the time of the act, it takes away an essential quality of guilt. But when the alienation of mind is alleged to have occurred after the act

but before the trial, after the trial but before the judgment, after the judgment but before or during the execution of the sentence, no mode of trial of the fact is provided by law; and yet, at each of these periods, particular provisions are necessary, as well to ascertain the fact, as to direct what is to be the consequence of its being found to exist. This is done by a chapter in this title, and by it an omission in our law, important to justice and to humanity, is supplied.

The Code of Crimes and Punishments having directed, in order to avoid collusive prosecutions for adultery, that in all prosecutions for this offence against a supposed adulterer, the offending wife shall be joined, and having referred to this code for the manner of conducting it, it is directed, that where the defendant is so charged, shall have been cited or arrested, but shall not appear, that an attorney shall be named to represent him, and that the trial shall proceed in his absence; and that if he have left the state, so as not to be served with process, a warrant shall issue and be renewed from time to time until the trial, which, if he do not appear, may proceed against the wife alone.

The collection of small fines, imposed by courts, is not now sufficiently enforced. The code remedies this defect, requires frequent returns by the collecting officers, and makes it the duty of the state treasurer to prosecute such of them as are delinquent, and to carry all such sums as may be collected, to the credit of the "Compensation Fund," which has been referred to in the beginning of this Report, where it is spoken of as the means of paying the premiums for extraordinary services and providing the marks of honorary rewards; it is here also burthened with an indemnity directed to be paid to all those who shall receive, on their being discharged before trial of an alleged offence, a certificate from the judge, or from the jury who shall acquit them on the trial, that no improper conduct gave reasonable ground for suspicion. This indemnity is granted on the ground that society is bound to compensate all such evils as are necessarily incurred for its safety, where

they are not the result either of an obligation binding on all the citizens in general, such as assisting the civil officers in preserving the peace, or of losses so great in amount and general in their nature as to become too burthensome to the rest of the community, such as granting indemnity for the ravages committed by an invading enemy, or the conflagration of a city to prevent its falling into his hands. The injury received by a groundless accusation is of another character. It is not the result of any duty, and it can be compensated without any great sacrifice. When the prosecution is malicious as well as ill founded, the state is exonerated from this burthen, for the loss was not incurred for its benefit; and the indemnity may be recovered against the malicious prosecutor. The state is only bound to pay when there was reasonable ground for suspicion, but which did not arise from any negligence or imprudence of the party accused. The amount of the compensation is to be fixed by the judge, but under limits which effectually prevent its being made the object of collusive speculation, while it affords the relief which justice requires to the poor and the oppressed.

Four General Provisions are inserted at the conclusion of this book. By the first it is declared, that no omission of any matter of form presented in this system, nor any departure from the forms given for proceeding under it, shall render the proceeding void, unless it be so specially provided; or unless the departure from the form has caused some injury to the party complaining of it. The insertion of this article is another attempt, and no good system can contain too many, to counteract the constant and fatal tendency to sacrifice substance to form. The second was, perhaps, superfluous; that when a particular and a general provision conflict, the former must prevail. A rule of true construction would sufficiently enforce it; but true rules of construction are not always those that are adopted. Although a strict adherence to the distribution of the system would have required that all offences whatever, as well as the punishment assigned to them, should have found their place in the Code of Crimes and Punish-

ments, and not elsewhere; yet it was deemed expedient to depart from this rule in many cases, where a penalty is annexed to the non-observance of a rule laid down in any of the other codes. The inconvenience of at constant reference from the one code to the other would have been an inevitable evil, but one of the least attendant on the transfer of the definition of the offence to the former. The two subjects, in their nature distinct, would have been so amalgamated as to create a greater confusion than that which it is the intention of the system to correct. Certain offences, then, being necessarily defined by this code, and the punishment denounced, the third provision of this chapter became necessary, which directs that all offences, created by this code or the Code of Reform and Prison Discipline, shall be prosecuted and tried in the same manner with those which are created by the Code of Crimes and Punishments. The last article gives a rule for calculating the time allowed by the code for certain notices and other proceedings.

The concluding book of this code contains forms for all the proceedings which are directed or authorized by its preceding parts. In framing them, which has been done with much care, the object kept constantly in view, was to unite brevity with so much certainty and precision as would secure the party from any possibility of mistake as to the precise fact of which he is accused. If the reporter has been successful in this, he has attained a most important object, by closing the door against one of the greatest evils in penal jurisprudence. He offers this branch of the system, with the same diffidence of his own powers that attended the presentation of the first; the same hope, that what is good in it may be preserved, and what is bad corrected; and the same firm reliance on the industry and patient research of the legislature in examining, and on their wisdom in making a decision on its merits.

INTRODUCTORY REPORT

10

THE CODE OF EVIDENCE.

INTRODUCTORY REPORT

TO

THE CODE OF EVIDENCE.

No branch of jurisprudence requires greater certainty and more simplicity in its provisions, than that of judicial evidence. But there is none in which so little of either is to be found. The reason is, that, with fewer exceptions than exist in any other division of the science, it has been abandoned to the vacillating authority of decisions, for its creation and amendment, without any superintendence of the legislative power. This was a natural consequence of the transition from the semi-barbarism of the middle ages to the more improved state of the science in modern times. During the period when the Divine power was invoked, and supposed specially to interpose in litigated questions, by protecting innocence and making justice prevail in the ordeal and the battle, human testimony would of course be considered of minor importance. In proportion, however, as these miraculous interventions of the Deity ceased to obtain credit, and the agency of human justice and discretion was called in to supply its place, it became necessary to consider what evidence ought to be received in order to direct them. But no legislative provision had been made for this change, which was imperceptibly produced as the mists of ignorance and the veil of superstition were slowly withdrawn. In every case in which the witness was substituted for the champion, and the ordeal of justice for that of the elements, the court was obliged to make some rule for securing the appearance of the witness; interrogating

him to come at the truth; determining what persons ought to appear in that character, and what degree of credit, under different circumstances, was due to their testimony.

In the earlier periods of jurisprudential history in Europe, the distinction between oral and written evidence can scarcely be observed. But when literary education became more common, writing was prescribed by the legislative power, in some cases, as a check upon the inaccuracy of testimonial evidence; and as the few laws it was found necessary to pass were couched in general terms, and frequently in obscure language, the judges thought themselves authorised to supply deficiencies, and sometimes to restrict what they deemed the too comprehensive words of the text; and thus the law of written as well as of testimonial evidence became the creation of judicial decisions, not of legislative acts. It is, however, easier to trace its origin with tolerable certainty than, with any probability, to account for some of the extraordinary features which distinguish it. There is such a moral beauty in truth, it is so necessary to us in all our intercourse with each other, that we have been endowed by our beneficent Creator with a love for it, which, if not innate, is necessarily produced by the circumstances in which he has placed us (a). Man never swerves from truth without some temptation, some real or imaginary good, that he promises himself from the falsehood. Doubt even on matters of little moment, is an uneasy sensation: and there is a corresponding satisfaction in that state of the mind which results from a conviction of truth; so that, as in the ordinary affairs of life, no one makes an assertion of fact, but with the intent of producing belief; so no one hears it without a desire, sometimes imperceptible and involuntary, to be convinced of its truth or falsehood. But this conviction can only be produced by evidence. As long, therefore, as he is deprived of any evidence which is known or suspected to exist, so long will the uneasy state of doubt,

(a) *In primis, hominis est propria veræ inquisitio atque investigatio. — Cicero.*

in a greater or less degree, continue. If this be true in relation to matters where neither interest nor duty, but a mere love of truth, call upon us to decide ; how much more strongly will the desire be felt when life or fortune depends on the correctness of the decision. Yet it is precisely in cases where this longing after truth should be gratified, that is to say, in litigated questions, that the evidence by which it is to be ascertained is most restricted. Every where else, all sources, even the most suspicious, are examined ; he who is to judge relying on his own power to discriminate ; here alone he is taught to distrust that power, to reject all evidence that may possibly lead him astray, and where he cannot be guided by the full blaze of the noonday sun, to prefer utter darkness to the twilight, in which he might have discovered his path. To trace this leading feature in our law of evidence to its original causes, would be rather a curious disquisition than one leading to important practical results. It most probably is derived to us from the civil and canon law, where this principle is carried to a most extravagant length ; and where the secret examination of witnesses by judges unacquainted with the circumstances of the case, made the risk of deception very great ; where there was no confrontation, no personal cross-examination, no publicity, and where the parties themselves were not allowed to be present, detection was rendered so difficult, that it afforded a plausible pretext for absolute exclusion in all suspicious cases. The compass of this report will only admit of a reference to such restrictions as now exist, and a notice of those which it has been deemed necessary to retain or to abrogate, with the reasons by which the alterations are supported. These will be developed as we proceed with the details of the system.

This code begins, as those which preceded it have done, by an Introductory Title, laying down rules and making explanations to avoid circumlocution, and to give the perspicuity necessary to a full understanding of the subsequent provisions. Two of the articles are of a different character, and demand particular notice. They

are intended to check the legislation of the courts, and to provide for the progressive amelioration of the code by the General Assembly, the only legitimate power for that purpose; while the right of pointing out defects, and suggesting improvements, is conferred on the judges. As the law formerly stood, the whole law of evidence, with very few exceptions, was, as we have seen, the work of the court, over which the legislature very rarely exercised even a corrective power; more frequently the courts corrected the statutory provisions; and by their rules of construction, for enlarging and restricting the operation of the written law, assumed and exercised, by whatever name it may be called, a legislative power. As this is a part, nay, the very foundation of the common law, the observation is not intended as a reproach to the judiciary of the country from whence that law is derived. But it cannot be too often repeated, that in our constitution (a) it is not only affirmatively declared, that there shall be three separate branches of government—executive, legislative, and judiciary; but negatively, that the duties of no two of these branches shall be exercised by the same persons. Every exercise of legislative power by the judiciary is, in this state, unconstitutional, and it is the duty of the legislature to check it. But as all human works are attended with a greater or less degree of imperfection, it must happen that the operation of laws will be found to work injustice; either by embracing, under general expressions, cases not intended to come within them, or, by a too restricted phraseology, not providing for other cases which it was their evident object to include. These defects in laws gave rise to the rules of construction before alluded to, by

(a) Art 1, § 1. The powers of government of the state of Louisiana shall be divided into three distinct departments, and each of them shall be confided to a separate body of magistracy, to wit—those which are legislative, to one—those which are executive, to another—and those which are judiciary, to another.

§ 2. No person or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.—*Constitution of the State of Louisiana.*

one of which the court were directed to place themselves in the situation of the legislature (b), to inquire whether, if the case before them had presented itself to the mind of the lawgiver, he would have extended or restricted the words of his law so as to provide for it and others of a similar nature. This is called consulting the spirit of the statute; and the rule, as I have stated it, is every day referred to and received in our courts. While it is evident that this is the exercise of legislative power, inasmuch as it extends or restricts the operation of a statute, it cannot be denied that the defects of all laws are best discovered in their operation, and that, as to all those which relate to jurisprudence, the judges are the persons best qualified to point them out, although, by our institutions, they are not authorized to provide the remedy.

The object of the two articles now under consideration is to secure the advantages to be derived from the experience and wisdom of the judges in the suggestion of defects, while the remedy is reserved to the legislature, the only power to which it can consistently with the constitution be referred. The first of these articles relates to cases in which any positive provision of the code, for the admission or exclusion of evidence, is found to operate improperly, either to the prejudice of the accused, or the ends of public justice in criminal proceedings, or to the injury of any party in a civil suit. In every such case the court is directed to make an accurate report of the same to the legislature, with the reasons for thinking the law imperfect or unjust in its operation. Should the general assembly coincide in opinion with the court, the proper amendment will be made to the code under its appropriate head; and, instead of a judicial decision of doubtful authority, obligatory or not on their successors, or even on themselves, as they shall think fit, and only to be known through voluminous and costly reports, we shall have positive law, easily understood, to be found in its proper

place, comprised in a few lines, and binding on the courts as well as the community. If, in consequence of such imperfection, the accused shall have been acquitted, judgment in his favour must be entered without waiting for any further legislative proceedings, for it would be unjust to subject an individual to the vexation of a second trial for a defect in the law, even if the amendment required should be one that could not come within the description of a retro-active law. But if the consequence was an unjust conviction, or verdict in a civil suit, it is directed that no judgment shall be pronounced until the end of the session after the report shall have been made; when, if the provision is altered, new trials shall in both cases be ordered. If no change is made, it is evidence the legislature do not coincide in opinion with the court, and do not think the operation of their law improper or unjust; and as theirs is the supreme will, the courts must carry it into execution.

The first of these two articles having thus provided for the reconsideration and amendment of the code, in such provisions as seem unjust or defective in their operation, the second, in like manner, gives the remedy for omissions. In all cases where legislative enactments, or former decisions, gave no rule on the subject of the admission or exclusion of evidence, the courts necessarily, as has been observed, supplied the omission. They were obliged to admit or reject the evidence offered, and, having no legislation provided, were forced to decide according to their discretion, without one. After the adoption of this article, such an anomaly will no longer exist in our law. The legislator and the judge will each perform his proper duties, and no excuse will exist for the one to usurp, or the other to neglect them; for in every case where evidence is offered, and no rule is provided to direct the judge whether to admit or exclude it, legal authority is given him to do that which is now done without it; and in that case alone the rule, on which some animadversions have been made, is sanctioned, and the judge is directed to suppose himself in the place of the legislator, and to ask what would

probably be his opinion if the case had been presented to him, and to decide accordingly ; but to make report of the case to the legislature in the manner required by the preceding article, who will in like manner give or refuse their sanction to the principle adopted by the court, and insert the affirmative or negative provision in the code. Whatever the legislature do in this last case, will not affect the decision if in a civil suit, the ends of justice require that the delay, uncertainty and intrigue, incident to the revision by the legislature of an adjudged case should be avoided. The court decides the case before them, but makes no rule for future cases ; that is left to the legislature, whose proper province it is. But if the decision takes place in a criminal cause, and in consequence of the admission or rejection of evidence, not directed by any law, the accused shall be convicted, it is clear that this conviction will have taken place under an *ex post facto* rule, and is, therefore, illegal. The article consequently provides, that, in such case, judgment shall be arrested and the defendant discharged.

These provisions are deemed to be of the highest importance. They are new, and the attention of the general assembly is respectfully called to a close consideration of them. They offer, it is confidently believed, a complete answer to the objection that has been raised to a written code, from its rigidity, or what has been, by a celebrated jurisconsult, called its want of *malleability*. It cannot, indeed, be worked into any kind of shape that the discretion of a judge, well or ill directed, may deem necessary ; but, by this means it may be accommodated to the changes which take place in society, and adapted to its wants as they arise, and this more effectually, more constitutionally, and equitably, than by the legislation of decrees ; more effectually, because the sanction of positive law will not only give it a legitimate, instead of a doubtful authority, but because, being promulgated as a law, it will be universally known ; being concise, it will be easily understood, and a knowledge of its provisions may be acquired without expense ; more constitutionally, because

it will emanate from the proper department of government; and its superior equity must be apparent, when we consider that, in the one case, the rule is made and applied to an existing case, in the other, it has no force until after its enactment and promulgation. This most valuable and simple improvement in legislation was recommended in a former report; and the greatest confidence is felt in its efficiency, because, among the number of lawyers and statesmen to whom it has been proposed, not one was to be found who raised any other objection, than that it was a novelty—a characteristic necessarily attached to every improvement; while to a very large majority of them it appeared to promise the most important results.

The profound feeling which the reporter has, that the code he proposes must contain many errors, and that material omissions may be discovered when it goes into operation, induces him to urge the adoption of these two articles with the greater earnestness. The facility they offer of discovering these errors and imperfections, and bringing them to the consideration of the legislature, and the ease with which they can be effectually amended, cannot but lessen the reluctance he would have to propose any thing of which the correction would be attended with greater difficulty. He may be allowed, perhaps, to suggest another argument for their adoption, founded on a feeling different from, but not inconsistent with, that which he has just expressed. Conscious that there must be many imperfections in the work, he yet feels a confidence that it is founded on true principles, and that, from the manner in which they are reduced to precept, the general effect cannot but be eminently useful, with the safeguard of these provisions for the gradual perfection of the system. Therefore, the general assembly incur no risk in their adoption. Parts of which the utility does not seem perfectly apparent, may therefore safely be retained, until their operation is seen: that operation cannot be materially injurious, even if these parts are bad. The evil is instantly perceived, and a check is provided for

their operation on the first case in which they are discovered.

After these introductory articles, we come to the body of the work.

Evidence is defined to be that which brings, or contributes to bring, the mind to a just conviction of the truth or falsehood of the fact asserted or denied. Because, in weak minds, conviction may be produced, by that which, addressed to an understanding of common force, would create doubt or conjecture merely ; it became necessary to qualify by the epithet *just*, the nature of the conviction to be produced. So far as respects mere speculative opinion, there can be no danger in leaving the determination of what may be termed just to each individual's perception of right and wrong ; but, as applied to the determination of litigated rights, another qualification was necessarily introduced, and under the denomination **LEGAL EVIDENCE**, that alone, which is declared by law to be good evidence, forms the subject of the code.

If evidence may, according to the definition, produce, or contribute only to produce, conviction, it must, in relation to its effects, have different degrees of force. These degrees, producing as many different kinds of evidence, are, under this head, restricted to three, ascending from that created by mere induction, to that which is, by law, directed to have the force of complete proof ; **PRESUMPTIVE**, which, by establishing one fact, renders the existence of another probable, or, in some cases, certain ; **DIRECT**, which, if true, establishes the fact in question ; and **CONCLUSIVE**, which, in special cases, is declared to admit of no contradictory evidence.

Considered in relation to the source from whence it is derived, evidence is again of two kinds : first, that which the judge derives from his own knowledge :—secondly, that which is offered to him from other sources, and this last is again composed of **TESTIMONIAL**, **SCRIPTORY**, and **SUBSTANTIVE** evidence.

After these divisions, necessary for the order of the work, it proceeds with a more full explanation of the

different kinds into which it is distributed, and an enumeration of the rules applicable to each

Beginning with the division arising from the source whence the evidence is derived, a short title declares in what cases the judge may act from his own knowledge of the fact on which he is to decide, and in what other cases that knowledge is to be produced as evidence in the cause. In the first case it is provided that no judge can act merely on his own knowledge of the facts, excepting in those cases in which he is expressly authorized so to do by law. Those cases it is the province of the Civil and Criminal Codes, and their respective systems of procedure, to provide for. Instances, to elucidate the article, are given in the powers vested in the judge to pronounce on the authenticity of a record, in the right given him to commit for an offence, to remove for a disturbance in court, and to employ the military in aid of the civil power. But where the judge has knowledge of a material fact, in any case not so specially provided for, he is to be examined in the same manner as any other witness; and if he is the sole judge of the court, the judge of the adjoining district is to try the cause, in the manner provided for where the judge is interested. Jurors who are acquainted with any material fact, must, in all cases, be examined to give evidence to their fellows. In this title, the law is not materially altered. It is rendered more definite, and the sanction of written law is given to that which is now, in some degree, founded in loose practice.

The next division of evidence, derived from extraneous sources, is in itself more important, and, in this code, is especially so, because of the changes which it proposes in our present system. The first head, that of Testimonial Evidence, is the one in which these changes are of most consequence, and, in the opinion of the reporter, most required. They, however, repose on very simple principles, or, to speak more precisely, on a single principle, and that is drawn from the very definition of evidence.

The organization of courts, the enumeration of rights,

the means of asserting, with the denunciation of penalties for infringing them, and the rules of procedure, are only preparatory steps to the trial, which, in itself, is but the examination of evidence. Ultimately, then, the whole machinery of jurisprudence, in all its branches, is contrived for the purpose of enabling the judging power to determine on the truth or falsehood of every litigated proposition. This to be done by hearing and examining evidence; that is to say, hearing and examining every thing that will contribute to bring the mind to the determination required. If we refuse to hear what will, in any degree, produce this effect, we must determine on imperfect evidence; and in proportion to the importance of the matter thus refused to be heard, must evidently be the chance of making an incorrect rather than a just determination. But, as in morals, we are forbidden to do evil that good may come of it, so, in legislation, we should refrain from doing that kind of good which may produce more than its equivalent in evil. The desirable end to be attained by the admission of every species of evidence, may be more than counterbalanced, in some instances, by the evil attending it; sometimes, in the shape of inconvenience and expense inseparable from its procurement; sometimes, from the danger of error arising from the deceptive nature of the evidence itself. The great art is to weigh these difficulties, and in those cases where they are most likely to preponderate, but in no others, to exclude the evidence.

Before we enter into an examination of the provisions of the code now presented, it will be necessary to examine those of our present law. On the subject of evidence we have several different bodies of law to consult; one for civil cases, a second for a class of offences created under a particular statute, and a third for all other offences. For the first, we must consult the civil code; for the second, the common law of England; for the third, the laws of Spain (*a*). On the subject of exclusion, that now

(*a*) See Introductory Reports, p. 60, et. seq. and p. 157, in the note, and De Armas's case, 10 Martin's Reports.

under consideration, all these systems materially differ, and all of them are more or less uncertain in their provisions. By the civil code, the exclusions are, interest, relationship in the ascending or descending line, connexion in marriage, and the very vague description of "those whom the law deems infamous." It also forbids the examination of a counsellor or attorney in order to obtain a discovery of what has been confided to him by his client; but somewhat strangely, considering that the Catholic is the prevalent religion in the country, omits to provide for the inviolability of religious confession. These are the only general rules, relating to testimonial evidence in civil cases, that are provided by statute. For the exclusions in those criminal cases which are punishable under the statute of 1805, we must refer to the common law of England. To enumerate them, and note the exceptions with accuracy, would be a difficult, and as far as the ability and research of the reporter is concerned, an impracticable task; and without any endeavour to avoid the reproach of ignorance or want of diligence on the subject, he may venture to assert, that it has never yet been satisfactorily performed, as is manifest from the numerous treatises on the law of evidence which have appeared, become obsolete, and are replaced by others, themselves to become antiquated and laid aside whenever the changing system of decisions establishes new rules or creates exceptions to those which were in like manner previously established. Fortunately, nothing on this occasion is required more than a general outline, upon which to mark the changes that are recommended by the system now presented.

The circumstances which are generally understood to cause exclusion by the common law of England are, interest, connexion in marriage, infamy, incredulity as to a future state of rewards and punishments, the relation of counsellor or attorney to one of the parties, and conviction for an infamous crime. To the laws of Spain, as has been said, and, as is thought, satisfactorily proved in the Introductory Report to the System of Penal

Law (a), we must have recourse, in civil cases, to discover what is meant by the description in the code of "those whom the law deems infamous;" and in criminal cases, to direct us in prosecutions for all those acts which may be considered offences under the unrepealed Spanish law, and all those which are created offences by acts subsequent to the year 1805. The list of exclusions under these last mentioned laws, is filled to a most enormous length with every circumstance that can create the slightest suspicion of partiality, prejudice, or a disposition to falsehood. The principle of these laws seems to be, that the weakest inducement to utter falsehood is stronger than the greatest inducement to tell the truth; that all those who are counted infamous ought never to be believed; and that a usurer, a comedian, a slanderer, and all the others, who, by a most extraordinary classification, are involved in the stigma of infamy, as well as those convicted of crimes, ought on no occasion, not even for saving the life of the innocent, or the more favourite object of taking that of the guilty, to be heard. The intimate friend, the frequent guest, the near relation, all of whom were most likely to be acquainted with the circumstances and character of the parties, or accused, as well as the avowed enemy, were, or rather, as this is now our law, are, legally, in the cases above mentioned, excluded.

Without troubling the general assembly with a repetition of the arguments to prove this assertion, I again refer to that Introductory Report, only observing here, that it is no answer to say, that those laws do not exist, because the judges have not yet thought proper to act upon them. The question is not, what has, but what can be done: not what good judges have refrained from doing, from their own sense of right, not from the restriction of law—but what bad men might do in evil times, under the sanction of bad laws; or good men, under the impression that they are bound to execute them.

Omitting the unnecessary task of examining, in detail, the list of exclusions under the Spanish law, and showing

(a) Pages 103, 104, et seq., and p. 261, in the note.

their absurdity and injustice, I proceed at once to the examination of those which are acknowledged and enforced as part of the law of the state.

The first of these disqualifying circumstances, declared by the code to prevail in civil cases, and making a prominent feature in the common law adopted in criminal cases by our statute, is interest, which is construed to mean an eventual gain or loss that may be estimated in money, by the decision of a cause in which the testimony is produced. By the code now offered, interest shall no longer disqualify, but may be proved in order to lessen, in proportion to its magnitude and to the other circumstances of the case, the credit that may be given to the witness. This important change demands a full explanation of the reasons for proposing it. For this purpose it will be necessary to revert once more to the nature and effect of all exclusions of testimony. These have been shown to be injurious to the great object of judicial investigation, the discovery of the truth. *Prima facie*, then, there ought to be no exclusion; but, as has been observed, there may be evils attending the admission of certain evidence which may be greater than any good such evidence could produce in elucidating the truth. To exclude any species of evidence, therefore, it must be shown that such attendant evil predominates. This evil can only be inconvenience and expense in procuring the testimony greater than the advantage to be derived from its admission; or the probability that, if admitted, it will tend rather to mislead than to enlighten the judge. These probabilities must be weighed whenever we come to consider the propriety, or rather the necessity, for that ought to be evident, of creating a rule excluding testimony of any one description.

Now let us apply these rules to that which declares an interested witness inadmissible. This can only be found on the following suppositions: first, that pecuniary interest will be sufficient to induce the witness to incur the inevitable embarrassment and difficulty of sustaining an untruth in the searching trial of a rigorous cross-examination; secondly, the probability, too, of being detected, and of

the consequent punishment and infamy attending a conviction for perjury, in order to have the chance of the advantage he may promise himself from a judgment to be obtained by his falsehood ; for let it be observed, that, if, on the one hand, there is no certainty of punishment, conviction, or infamy, there is, on the other, no certainty of securing the advantage that prompts him to encounter the risk. Secondly, it must be supposed that the falsehood, thus asserted, will be believed by the judges of the fact. If not believed, the testimony cannot mislead ; and we may lay down as a rule which admits of very few exceptions, that with the aids of cross-examination, publicity, and the right of producing counter testimony, the chances are greatly in favour of truth against deception. On this head, too, we must not forget that the judge is on his guard against giving too implicit faith to the witness, because he is aware of the bias which interest would naturally create. The argument supposes the interest to be known, for, if not known, it cannot exclude. Knowing the interest, he will not only be more inclined, but better enabled, to test the truth of the testimony by a rigorous investigation ; and what is of more importance, he will be enabled to judge from the nature and amount of the interest, contrasted with the character of the witness, and other circumstances, what effect it will probably have on the testimony. These considerations must, therefore, tend to show, that even in the cases, and it is not denied that they may exist, where interest may induce a departure from the truth, the fear of its misleading the judge is greatly exaggerated by those who make it a ground for utter exclusion. The two assumptions, then, necessary to support the argument, to wit, that interest will always, or even generally, induce the witness to encounter the difficulties and dangers of asserting a falsehood, and that if it should have this operation, the falsehood will most probably be believed, have both been shown to be groundless ; and even on this preliminary statement, the disadvantages of shutting out the testimony of an interested witness must be apparent : but many other considerations must be brought into the

INTRODUCTORY REPORT TO

1. In the strike the balance of good or evil
2. is admission. A most profound writer on this
3. has argued, and with great force, that so far
4. as to deception, the testimony of an interested
5. witness in many cases, bring out the truth by the very
6. falsehood he makes to conceal it. No more false-
7. hood will be uttered than the witness thinks
8. is to be obtained on the object he has in view: from these
9. disclosures of truth, information of importance
10. is derived to corroborate or contradict other evi-
11. dence. Not so much will be uttered as is necessary, if it
12. is highly improbable, or may, from other circumstances,
13. be of great risk of detection. Truth must supply all
14. the intervals, and truth, from the lips of an interested
15. witness, is as valuable as if it were derived from a purer
16. source, but if he dare not tell the falsehood, because it is
17. too dangerous or too easy of detection, and will not tell
18. the truth, because it defeats his interest, he must have
19. recourse to silence or evasion; and either of these expe-
20. dients are as sure indications of falsehood, in most in-
21. stances, as a confession of it would be. Therefore, whether
22. the interested witness declare the truth or utter a false-
23. hood, or recur to evasion or silence, his evidence will more
24. probably lead to a just than an erroneous decision. False
25. testimony is more difficult to frame, and is more easily
26. detected, than those not conversant with judicial proceed-
27. ings might imagine. If the witness were at liberty, in
28. secret and at his leisure, to frame his own story, and state
29. only such circumstances as his imagination might supply
30. in a detailed account of all that he thought necessary,
31. without the fear of confrontation, cross-examination, and
32. publicity, he would have nothing but his invention to task,
33. and might, from his own stores, or the suggestion of
34. parties, frame a consistent tale that might impose on the
35. judge. But, fortunately, this is not the case; he knows
36. that the strictest scrutiny awaits every allegation that he
37. makes, and even his silence, will be

the subject of the severest animadversion ; that his very looks will not escape the attention of the practised cross-questioner ; and that, during his examination, the gaze of a hundred eyes will be upon him, and he cannot but fear that some one will start forth from the crowd to detect his falsehood. All this he must anticipate ; and under these apprehensions it will require more ready invention, more self-possession, and more courage than falls to the share of ordinary men to persevere in a feigned statement, and render it so consistent as to give it the semblance of truth ; so that, if these well-founded fears do not deter him from his purpose, they will at least, for the most part, render him incapable of carrying it successfully into effect. The part of a false witness is more difficult to act than is generally supposed ; and though many rashly and wickedly engage in it from a false confidence in their ability, yet very few can sustain it to the end, and through the great ordeals of cross-examination and publicity.

All this is on the supposition that pecuniary interest will always induce a witness to depart from the truth ; but when from the whole number which compose this class, we deduct those to whom the interest is too trifling to be an object compared to their fortune and situation in life—those who, even under the influence of a strong interest, would be restrained by the stronger motives of religion or morality—those who would be deterred by the fear of shame or of punishment—who, without either of those restraints, find their hearts to fail them from the difficulty of performing their tasks ; when we deduct all these from the mass of interested witnesses, we shall have very few left willing to sustain the character of perjured ones ; and of those few, not many who can do it with any prospect of success. But under the general words of the rule, all these are excluded—all kinds of pecuniary interest disqualifies. He who is worth millions of dollars, cannot be a witness if he is to gain or lose a single dollar of those millions, by the event of a cause ; the man of the highest sense of honour, or the most venerated for his holy life, is equally excluded, if the eventual gain or loss is equiva-

lent only to the hundredth part of those sums which he daily distributes in charity; and even in cases where detection is highly probable, the most timid is, by the rule, supposed ready to encounter the risk of punishment—and the most honourable, to take his chance of infamy, for the uncertain hope of an insignificant gain. Detection is presumed to be impossible, and the credulity of judges and jurors to be so great, that a false tale must, if it be allowed to reach their ears, produce instant conviction that it is true. They forget, who insist on this rule, how difficult it is even for truth to produce its proper effect, although attended with all the advantages it naturally brings with it; and they argue as if falsehood alone could charm the understanding and lay suspicion asleep.

The question then is this, whether on account of the danger of being deceived by the few who are willing to assume the character of perjured witnesses, a danger diminished by the many powerful means we have of detecting their falsehood, it would be wise to deprive ourselves of the testimony of all those infinitely more numerous classes of interested witnesses, from whom we may expect nothing but truth? For this is the only alternative. The law can draw no line between interests of different amounts, or between interested witnesses of different characters—it must admit or exclude the whole. Which shall it do? One consideration, if there were no other, would seem to resolve the question. Exclusion is, in many cases, a certain evil—admission only a problematical one. Where the incompetent witness, whether from interest or any other cause, is the only witness, certain injustice results from a refusal to hear him. Listen to him, and, first, it is not certain that his interest or any other cause will induce him to depart from the truth; and, secondly, if he do, it is not certain that you will believe him. If he is not the only witness, the other testimony will furnish additional means of detecting any false statement that may have been prompted by his interest.

It has been said, that the law cannot distinguish particular

cases, but must enact a general rule. This is obvious; and it is equally so, that the judges of the fact can. Let them hear the witness. From all the circumstances which they can collect, and which the legislator cannot, they can tell, with tolerable certainty, in which class of interested witnesses he comes—those who may be believed, or those who may not. This they cannot do without hearing him; and when they have done so, and have even assigned him to the latter class, they do more than destroy the ill effect of his testimony, because they draw from it all the information which, as we have seen, may be derived even from false evidence, and run no risk of crediting that which they discover to be inconsistent with truth. They can do, then, effectually, that which the legislative rule does imperfectly—they can let in the interested testimony which is worthy of credit, and exclude that which is not. Why does this rule exclude all interested testimony? Because a part only is unworthy of credit. Would wise legislators be guilty of this absurdity, and worse than absurdity, in many cases this injustice and cruelty, if it were possible for them to make the necessary distinction? Certainly they would not. Why not then commit this task to those who can? Why not say to those to whom they delegate the decision of facts, “Pecuniary interest has, in some cases, a seductive influence, injurious to the discovery of truth; in many others, it will not be felt. We can draw no line of demarcation between the cases. We cannot make the exclusion depend on the magnitude of the interest, because that is relative. Fix the minimum where we may, there are men on whom the smallest sum would have an improper influence; and others on whom the largest would have none. Wherever we draw the line, we shall admit suspicious evidence and exclude that which is unexceptionable. To be just, a separate rule must be made for every witness, because upon no two will the same amount of interest have the same effect. It is your privilege to determine what degree of credit the witness, under all the circumstances, favourable or unfavourable, in which he is presented to you, is entitled to, because it is your

duty to determine according to your conviction of the truth. In prescribing the duty, we will not restrain you from using the means necessary to perform it. You who see the looks and observe the demeanour of the witness, as well as hear what he says, you who can inquire into his circumstances and character; you who can judge how far his testimony is corroborated or contradicted by other evidence; you will be better qualified to determine whether the interest be so great as to render him unworthy of belief, than we are, who have none of these means of forming a correct judgment." This would be the language of reason. Instead of it, what is, in effect, that which is addressed to them? "It is true that you are delegated to decide litigated questions of fact. The greatest confidence must necessarily be reposed as well in your integrity as your judgment, in the general performance of this duty; but there is one point on which we dare not trust your discernment. We will not permit you to hear what an interested witness will say. We are sure, that under all circumstances that may counteract the bias of his interest, and however small that interest may be, we are sure that it will induce him to utter a falsehood; and we are sure that, in spite of all the means we give you to detect it, we are sure, that however improbable it may be, you will believe it. Therefore, whenever a witness is presented to you, ask him first, whether he will gain or lose a cent by the decision of the cause; if he answer truly, that he will—be sure that he will answer falsely on every other point on which you may examine him. It is useless to inquire, what proportion the interest bears to his income; it is useless to ask, what is his character for veracity or religion. The highest standing in society, the best reputation, the largest fortune, are nothing compared to this all-prevailing interest of a dollar, or a cent. Do not give yourselves the trouble to inquire, whether the circumstances do not show a case in which falsehood would meet with certain detection. The fear of punishment—the fear of shame—the restraints of religion—all give way before this irresistible interest of a dollar, or a cent. No mat-

ter if the fortune, the reputation, or the life of a citizen depend on the question, it is better they should all be lost, than that you should listen to an interested witness. You may hear the sworn enemy of the party. You may hear his brother or his most intimate friend. We can trust you with the difficult task of determining what effect all the passions of the mind can have in giving a colour of truth or falsehood to testimony. But interest, all-powerful interest, has no shades of difference—a cent will influence the richest banker in the same degree that a dollar will a beggar. Wherever this appears, you must exclude it—without pity for the ruin it occasions—without remorse for the death it inflicts!” This is the true meaning of the short precept of the English law, and the equivalent provision of our civil code. There is not a word of exaggeration in the comment I have given; and after considering the subject in all its bearings, who can hesitate on the question, whether interest ought not rather to be considered an objection to the credit than to the competency of a witness? In the first case, you can appreciate the bias at nearly its true value, according to the circumstances on which it has to operate; in the last, the strongest and the weakest motives are considered as having equal force.

The truth of this reasoning is evident from the efforts which, of late years, the courts have been making to get rid of the shackles with which they have been bound by their own decisions; unable or unwilling to declare the rule unwise and unjust, they have relaxed it in some cases, but retained it in others, which, for the same reason, ought to have formed an exception, and by hearing interested witnesses in some cases, and rejecting them in others, they have not only abandoned the propriety of the rule, but have established no uniform principle on which another can be founded. Exceptions, the maxim asserts, prove the rule. They may prove the existence of a rule, but never that it is a proper one, unless there is some reason applying to the case excepted, which does not apply to the rule. Where the reason for taking a case out of the operation of a general rule is a good one, and applies

with equal force to all that are left within it, there can be no better proof that the rule itself is bad. Let us examine the exceptions in this view; premising, however, that in civil cases there can, in our state, legally be no exception. The legislative will is clearly and imperatively expressed: those who are interested—no matter in what degree, no matter whom the witnesses may be—are all excluded. No enlarging or restrictory construction can here apply. It cannot, under any pretence, be said that the spirit of the law does not apply to any of the cases excepted; while it is acknowledged that they are all embraced by its words: for the spirit of the law, as well as its words, excludes all interests. Yet our courts in civil cases, without any legislative authority, admit all the exceptions contained in the English law. They admit them legally, in all criminal cases, under the act of 1805; and they admit them again, without authority, in the other offences created by legislative statutes. Allowing the exceptions thus generally, with and without express authority, the propriety, or a supposed necessity, must have strongly pressed upon them; and therefore, the opinion of the courts has been clearly expressed against the rule, and in favour of the exception.

The first of those exceptions is the case of a factor in trade, or any other agent, who makes a sale or a contract for another, on the amount of which he is to receive a commission. If the sale itself, or the amount of the sale, be disputed, and a suit be brought to recover the amount, the factor or agent is a good witness. Yet he is evidently and largely interested: if the sale be established, he receives five per cent. or one-twentieth part of all that is recovered; if the sale be disaffirmed, he receives nothing. Indeed, the interest in these cases has never been disputed, but he is admitted on the ground of an alleged necessity. It is proper to examine here in what sense this word is used. It is employed by, I believe, all the judges who have sanctioned the doctrine, and can mean nothing more than that if the witness were not heard, there would be a loss of some part of the truth which would not appear, for it

must be observed, that no inquiry is made previous to the examination of the factor, whether the sale could not be established by other evidence. There may have been twenty witnesses present when it was made, yet the factor is examined: not surely for want of other testimony. Why then? The only answer that can be given must be, because he is considered as a good witness; because, although largely interested, the probability was in favour of his adherence to the truth; or that, if he swerved from it, his falsehood would be detected. The necessity in this case, then, differs in nothing from that which takes place in every litigated question, that is the moral necessity of giving to those who are to determine the truth all the means necessary to ascertain it; and if it exists in all others where an interested witness is produced, then the deduction is irresistible, that in all other cases the interested witness ought to be examined, and that the exception should take the place of the rule. That the factor is admitted as a witness, not from the defect of other testimony, is evident from the reason that has been given, that no previous inquiry is ever made on that subject; consequently, he is admitted, not because there is no other proof—but, let us suppose no other evidence to be in existence, he is then, according to the language of the exception, admitted from *necessity*: then it follows, that it is better for the ends of justice to take interested testimony than no testimony. But if it be calculated to mislead, why should it be heard in this case and refused in all others? But experience has shown, that there is no danger: the evident utility of the exception, which has induced learned and prudent judges to go beyond the bounds prescribed by their constitutional functions in order to establish it, show, that there is no danger—show, that it is useful and necessary in this case; and the reasoning, from the closest analogy, must convince us that it is so in all others.

In every case, either the interested witness is the only one to establish the fact, or he is not. If he be the only witness, then he may be admitted, according to the reason

on which the exception is said to be founded, from the necessity in all cases whatever, as well as in that of the agent. If he is not the only witness, then, neither in the case of the rule nor of the exception, will there be any danger in admitting him; for the other evidence will give the means of detecting his mis-statements; or the knowledge of its existence will deter him from making them. Nor will the alleged necessity exist. Thus, every reason that can be advanced in favour of admitting the exception, applies with equal force to the abolition of the rule.

The second exception to the rule, and under the same plea of necessity, is that of a servant, who, in the *way of trade*, is employed to deliver goods to a purchaser; or a clerk, who is employed to pay money to a creditor. Such servant, in a suit against the purchaser, is a good witness to prove the delivery, and the clerk to prove the receipt of the money; that is to say, to prove that they did not themselves embezzle the property (*a*). All the reasoning employed in the preceding case applies with equal, if not greater, force to this; for here he is prompted to charge the defendant, not only to save himself from loss, but to preserve his reputation. Yet, in other cases in which the necessity would seem equally to exist, the rule is enforced, and the witness is excluded. A master of a vessel is not a competent witness to prove that there was no deviation in an action on a policy (*b*). The driver of a coach is not a good witness in an action against the owner for injury done by negligently driving. Yet, in these cases, no one so well as the captain or the driver could know whether there was deviation or negligence. It is said, indeed, in defence of this distinction, "that, although the agent is a competent witness to prove that he acted according to the direction of the principal on the ground of the necessity, and because the principal can never maintain an action against his agent for acting according to his directions, yet, if the cause depend upon the question whether the agent has been guilty of some tortuous act or negligence in the

a Espin. 509. *b* Espin. 48.

(*b*) Starkie Ev. 1780.

course of executing the orders of the principal, and in respect of which he would be liable even to the principal if he failed in the action, the agent is not competent without a release." I give the words of the most approved treatise on evidence here to show what stuff the reasons, on which these distinctions are founded, is made of.

The agent is a good witness for the principal to prove the payment of money or the delivery of goods which he himself may have embezzled. Yet he is not a good witness for the owner of the carriage to show there was no negligence. In both cases, by procuring a verdict for the owner, he exonerates himself from any action. In both cases, he is perhaps the only witness of the transaction, and the best witness in the case of the negligence. One, too, who lays a wager on the event of the suit, is a good witness (a). Why? Because he does not come within the rule? Surely not. His interest is apparent. Why then? Another exception is made for his case, and another reason to support it. The party to the suit has a right to the evidence: and the witness shall not, by his act, deprive him of it. Now what right has the party in this case that every other party has not? Has not every party to every suit a right to the production of the truth? But the witness, in this case, produces the interest and apparent disability by his own act! So much stronger the reason for excluding him. A man must have a strong hostile feeling to a prisoner who lays a wager, not only that he will be convicted, but that he (the witness) will convict him (b). Here are interest, animosity, and perhaps the worst passions, all combined; yet he is a good witness, because, say other authorities, the interest accrued after the case (c) had arisen in which he is called as a witness. But if bare interest disqualifies, then surely it is of no consequence how or when the interest accrued. The argument for the general rule is, that the judge of the fact will be more probably misled than enlightened by

(a) Skinner's Rep. 586.

(b) 1 Strange, 652.

(c) In the strong case of a witness to a will, a good and disinterested witness at the time of making the will, who *becomes interested afterwards*,

hearing an interested witness. If this were true, he ought not to hear any interested witness, still less one who to his interest joins a strong persuasion or prejudice on the side which he is called to support. But it is not true, and this exception proves it! The truth is, that the disqualification from interest was found to be so inconsistent with principle, that imroads have constantly been making upon it by exceptions, and I refer to the numerous treatises on evidence, for others, none of them supported by reasons that would not justify the total abolition of the rule itself.

Another evil attending it, independent of the injury by the exclusion of evidence, is the uncertainty it has introduced in the law. Cases, either entirely contradictory to each other, or supported by the most flimsy distinctions, give to acute lawyers the means of defeating justice; and to astute judges that of making the balance turn to the one side or the other, as their passions or prejudices may prompt, without, in either case, being liable to the reproach of acting without authority. Abolish the rule in all cases, and no such possibility can exist. The evidence will go to the jury, when they are the judges of the fact; to the court, when they are not; in both cases, there will be the check of public opinion, which is either totally lost or greatly weakened when the testimony is suppressed. The reasons for believing or discrediting the witness will have their full weight, because they will be drawn from the circumstances in each case. The advantages will not be lost which arise from the involuntary or necessary admissions of truth, which come from an interested witness, even in the cases in which he is desirous to deceive—from his manner—from his hesitation—even from his silence. The law will be rendered simple on a subject which gives rise now to numerous discussions, and produces great per-

cannot be a witness to prove the will, and the last intentions of the testator, although accompanied by all the forms of law, become frustrated! 2 Hayward's Rep. 147. It is not, then, the time at which the interest across justifies the exception. We have seen that the other circumstance, its being the act of the party, would rather add to, than diminish, the reason for excluding him.

plexity. The judge will no longer have it in his power to admit or exclude, almost at his discretion, every witness who is at all interested.

This result, so important in itself, so easy of execution, and so general in its operation, is now partially obtained, by a mode which places the interest of the parties frequently in the hands of the witness, by making it optional with him to give up or retain his interest, or with the party to exclude him when he is supposed to be unfavourable by refusing to exonerate him from a liability. This operation for instantaneously transforming a bad into a good witness, for rendering a statement credible, which, if uttered before it was performed, would be unworthy of being even listened to : this operation is called a release ; and, according to the circumstances of the case, it must be performed either by the witness or by the party. Where the interest consists in an emolument to be gained by the witness by the event of the cause, it is plain that his own act is required to renounce their advantage. If he has a strong desire that the party should prevail, and his testimony is material, he signs the release, his evidence is taken, and the cause is gained. If his wishes, contrary perhaps to an inconsiderable interest, or a secret interest stronger than the apparent one, should be different, he refuses the release, and the party, whom he might have saved, loses his fortune, his reputation, or his life. The witness, then, is the arbiter of his fate ; not by perjury, or other illegal means, but by the exercise of a legal right, for which he can incur neither punishment nor reproach. Again, the interest may arise from a liability to some demand which may be the consequence of a certain decision of the cause. In this case it is evident that the release must come from the party to whom the witness must pay or account. If he give the release, the witness is heard ; if he refuse, the testimony is rejected. Here again he becomes the arbiter. But the whole of this is downright mummery, unworthy of a place in the jurisprudence of an intelligent people. So far from adding any thing to the credit of the witness, a release ought nine

times in ten to detract from it ; because it must always arise from a stipulation expressed or understood, that the witness will state to the jury what he has before stated to the party ; and all these contrivances to escape from the operation of the exclusionary rule, must demonstrate that it is unwise and unjust.

Analogous to the extraction of truth from interested witnesses, is that of learning it from the statements of the parties themselves. To a certain extent this is permitted by our present law. In the code now offered it is extended, and alterations are proposed in the manner of obtaining it.

If, on the one hand, the parties are those most strongly tempted to alter or conceal the truth ; on the other, they are those whose knowledge of the case best enables them to declare it. These conflicting considerations have, in the jurisprudence of most nations, produced the effects that might have been expected from the same source which excluded the testimony of interested witnesses. A general rule, with exceptions founded on reasons more or less applicable to the rule itself, produced a continual struggle between a conviction that the rule was unjust and the want of courage to avow it, and to break through the trammels it imposed. In England a party may, by an expensive proceeding, in another court, obtain answers, on oath, to such questions as he may propose to the adverse party. In France the same power is given to the party, without the necessity of resorting to another court ; and it is there extended to the judge by what is called the *decisory oath*, when the evidence is, by an artificial scale they have established for graduating it, equally balanced. Here it is given to the party only, but in the same court. In all these cases there are defects, both of form and substance. Of form, in that they all require the questions to be propounded in writing, and answered, with, I believe, the exception of the *decisory oath*, in the same manner, without cross-examination, and not in the presence of any one but the magistrate who attests the deposition. This is a radical defect. Of substance, in that the right of interrogation is confined to the opposite party, to the total

exclusion, in our system and that of England, and the partial exclusion in the French practice, of the judges of the fact. We allow the plaintiff and defendant in civil cases mutually to interrogate each other by the exhibition of written questions; if these are not categorically answered, the facts, it is declared, shall be taken to be confessed. This supposes that a fact must always be stated in the interrogatory, and the affirmance of that fact is to be the consequence of an evasive answer, or of silence with respect to it. This is highly inconvenient to both parties (*a*); but what is more so, is that the answer is final—no explanation can be required of what is equivocal—no cross interrogatories to test the truth of what is said, or procure the disclosure of what is omitted: yet the law permits the respondent to go beyond a mere categorical affirmation or negative answer; he may state circumstances closely connected with the subject of the interrogatory; and yet on this matter, be it ever so material or unexpected, the party has no right to question; with the prior interrogatory and the answer to it, the whole process stops. In considering this head of evidence, it appeared to me, that if it were proper to get that of the party, it should be got effectually, and when we were applying to a source of evidence which is manifestly the most suspicious, that all the means should be applied to render it full, correct, and faithful, which were used in other cases. I could see no reason why any of the precautions, necessary in cases where the witness is supposed to be impartial, should be omitted. If we hear the party

(*a*) Suppose an action on a promise, and the plaintiff, wishing to establish, by the oath of the defendant, that when charged with having made the promise the defendant did not deny it, put this interrogatory, Did you, on such an occasion, deny that you made the promise? and the defendant evades the question or refuses to answer it, what is the consequence? The fact, in the interrogatory, is taken to be confessed. But as far as there is any fact stated, it is that the defendant did deny the debt. It follows, then, that the refusal to answer, so far from operating as a confession of what the plaintiff wishes to prove, has a directly contrary effect, for it establishes the fact that he did deny the debt, a fact which, perhaps, he would not directly have stated on oath.

at all, let us extract from him the whole truth, parts of which his interest may induce him to conceal ; let us, by cross-examination, detect all the falsities that same interest may induce him to frame ; let us, by the publicity of the examination in the presence of the parties and the judge, and of that faithful guardian of private rights, the keen gaze of the public, deter him from the difficult task of swerving from the truth.

Permit the party to ponder over a written interrogatory, which he is to answer in the same mode ; let him call in the assistance of a learned adviser to frame his deposition in such a way as to avoid the danger of perjury on the one hand, or avowals injurious to his interest on the other ; let him attest to this in the presence of a magistrate, who is not to judge the suit, who does not read the deposition, and who hurries over the formal words which convert the mere statement into judicial evidence ; manage affairs in this manner, and the result will always be that which it is found under our practice, that in most cases, the one party will not dare to probe the conscience of the other ; more especially when, as it were for the express purpose of tempting him to falsehood, he is told, whatever you say shall be taken for truth, no matter how improbable it is, if two witnesses cannot be found to contradict, or one witness corroborated by strong circumstantial evidence, or by written proof. Surely this is a strange inconsistency in our law. The testimony of a disinterested and impartial witness is left to have what credit the judges of the fact may, from his character or other circumstances, be inclined to give him ; but the oath of the most suspicious witness, the party himself, the one most interested to suppress the truth, is directed by law to be conclusive, unless contradicted by two witnesses, or one witness with strong circumstances, or written proof. And it seems scarcely a fair answer to say, the party who called for his opponent's oath knew the consequence of his making an unfavourable answer, and was at liberty either to ask for it or not. The question is not, whether he knew the consequence or did not know it ; but, whether the condition is just, and such

as ought to be imposed. The party calling for the answer shows, by that act, his own belief in the fact which he states, and his confidence that the other party will acknowledge it. If disappointed in this, what good reason can be given why he should be precluded from arguing, that other circumstances in the case, that the improbability of the testimony, or its inconsistency, should induce the jury to give it no credit? Why should the jury, who perhaps do not believe a word the party has declared, be forced to consider it as truth? The conviction that no good answer can be given to the queries, has induced the reporter to propose a repeal of the restriction, leaving the judge of the fact free in this, as in other instances, to decide according to his belief of the fact.

The reasoning which has been given for the admission of interested witnesses applies, in a great measure, to that of the parties themselves. But I have stopped short, in the code which is submitted—and perhaps I have done wrong in hesitating—I have stopped short of making the party a witness for himself, except in the case when a piece of scriptory evidence, unsigned by the party, is produced as presumptive evidence against him. In this case, the code gives him the privilege of stating the circumstance under which it was written, and his intent in writing it. With this exception, he may only be examined by the opposite party, by the judge, or by any one of the jurors; the examination must be under oath, in open court, and subject to cross-examination by the opposite party.

The innovation, made by the code, in extending the right of examining a party to the judges of the fact, as well as to the opposite party, is founded on this reason:—The suitor may decline examining his opposite party from one of two very different motives; because he has no confidence in his integrity, or because he is conscious of the want of that quality in himself, and fears that the plain tale of his adversary may carry conviction with it. The change proposed puts it in the power of the judge of the fact, to do that which the party fears to do, in the last instance, from a bad motive; while, in the cases where the

reasonable suspicions of the one party prevent his having recourse to the conscience of the other, the extension of the great connectives of oral interrogation, with its concomitants, cross examination and publicity, lessen, almost to zero, the chance of false statements leaving any impression.

Why the party is not allowed to be examined whenever he himself chooses, is not quite so obviously in conformity with the principles of the code, which, as has been seen, is to allow no exclusion of any thing that is calculated to throw light on the subject; and it has been observed, with much show of reason, the expositions of the parties are what the judge principally requires. It is to this source of evidence that men, in the common affairs of life, most resort when they are called on to decide on any particular fact. They hear the charge, the answer, the reply, the allegations of both parties, with all their circumstances; then where there is doubt, they look for other proof, compare the whole, and then decide. Why will you deprive the party of the right he ought to have, of being heard, of clearing up doubts, and rectifying errors, which may have been produced by the inattention or design of witnesses, or the ambiguity of other evidence? This objection would have great force but for two circumstances, and perhaps has some in despite of them. For the first, we must recur to another provision in the code, which requires that all petitions and answers, in civil cases, must be attested on oath. The second is, that, in most cases, it may be said in all, where the evidence leaves any doubt, the power given to the judge and to the other party, to interrogate, will answer the end proposed.

The article requiring all petitions and answers to be exhibited under oath, was introduced after much reflection, and I ought candidly to state, in opposition to the advice of some professional friends, for whose opinions I have the highest respect. They argued against this, as well as against giving the right of interrogation to the judges of fact, on the ground, that multiplying oaths made them too common, thereby lessening their sanctity and force; and that an affidavit to the truth of a petition would soon

become as proverbially insignificant as a custom-house oath.

1. To this it was answered, that oaths came to be lightly considered not so much by the frequency of the occasion on which they were exacted, as from other causes ; that among these causes was the above, which this very provision was intended to correct ; that of allowing any allegations in a judicial proceeding, made by a party, to be considered as a matter of form, which might be false, and yet attach no blame to the person who swore they were true ; that where pleadings were verbose, technical, and founded on fictitious forms, the objection would have great weight, because then the party would generally ill understand the tenor of the instrument to which he attested—the most scrupulous party could find it difficult, in the mass of an English bill in chancery, to distinguish between the material facts and the formal allegations it contains, and the ready excuse, “I was told it was a mere matter of form,” is always at hand to satisfy those of an easier conscience. But in a system which discards all fictions, where there is no form inconsistent with truth, which requires facts to be set forth in plain language, as there is no difficulty in distinguishing the truth, neither is there any excuse for falsehood ; and no more evil need be apprehended, because every suitor is obliged to attest to his proceedings, than there is from administering an oath to every witness. Another reason why oaths are treated with inattention, is not their frequency, but the mode of administering them, the essential part of the ceremony being performed by the magistrate or clerk, who, in a hurried manner, and often unintelligibly, repeats the words of the attestation, while the deponent is not required to utter even a word of assent to the obligation on his conscience, but signifies it by a gesture, in itself of no meaning. But when, as is provided in the code, solemnity is added to the form of the oath, the words of which the deponent is bound to repeat—when he is reminded that he must submit to cross-examination, and instructed in the consequences of his departure from truth—it may fairly be pre-

sumed that the additional number of oaths required by this provision will not lessen their binding force. This last mentioned precaution is quite new, and deserves particular consideration. All the attestations, under oath, to written instruments, as our law now stands, are not only ex parte evidence, but, in most cases, courts will admit of no counter proof, much less counter examination; and, in many causes, amendments to such affidavits have been refused. The party, or his counsel, prepare the declaration with great care; so much of the truth, and no more, is set forth as they think necessary to attain the object, and even if an idea inconsistent with the truth is conveyed, the language in which it may be couched, by its equivocation, secures the party from all fear of prosecution for perjury. Here the whole matter ends. The proof, thus furnished by the party, is presented to the judge, who, on this evidence, grants the order demanded, frequently an order for arrest of the person, for a seizure of goods, or some other proceeding in a cause, equally important. Here is the testimony of the party himself admitted in its worst and most dangerous form. No opportunity for cross-examination; no declaration in full; no appearance of the deponent before the judge; the affidavit most frequently being made before another magistrate. This evil was one of great magnitude, and to correct it, as well in cases where affidavits are already admitted as to prevent its recurrence in those now under discussion, the code provides, that whenever an affidavit shall be taken in the course of judicial proceedings, previous notice shall be given, whenever the ends of justice will not be thereby defeated; but when that may be apprehended, the deponent must be informed that, at a convenient designated time, he must attend for cross-examination, and that wilful falsehood will incur the same penalties as if it had been uttered under oath in open court. These precautions, it is thought, will obviate the fear of rendering oaths too common, and making parties regardless of their solemnity. How far it would be proper to abolish the rigorous sanctions given to a judicial declaration, has been a matter of some doubt. The regard paid to a simple

affirmation by a very numerous part of our community, whose consciences do not permit them to take an oath, would seem to indicate that it might be done with safety. But for the reason stated at large in the Introduction to the Code of Procedure, this sanction is preserved in all cases, but those in which the declarant has religious scruples.

2. The other objection urged against requiring the oath of the party to his petition or defence was, that it would be considered as evidence by the judges of the fact, and that an undue influence would thus be given to the powerful, the rich and influential, over the poor and unknown suitor. I repeat this argument because it was addressed to me from a highly respectable source, and therefore I am inclined to think there must be more force in it than, I confess, I have been able to discover. This is certain, that a declaration under oath, of any man, whether witness or party, will derive some credit from his character and the absence of motives to falsehood, which his situation in life suppose; but so will his word when not under oath. If the plaintiff, who is rich and esteemed, presents his petition, under oath, in like manner does the poor and unknown defendant attest his answer. The relative credit of the parties is preserved. Indeed, of the two modes, the present affords the greatest advantage to the man of credit; his simple assertion will, sometimes, have more weight than the oath of one of bad or unknown character, but would, certainly, other things being equal, be more readily believed than the simple declaration of the latter. Requiring the oath of both parties restores, in a great measure, the equality. But if the objection be good for any thing, why not apply it to witnesses as well as parties? And for fear that the oath of the influential man should preponderate over that of the poor and humble, why not banish the oath in this case also? As the law now stands, there is nothing, it is believed, to forbid any individual from swearing to his pleadings; and thus it is optional with any, who thinks he can derive an advantage from it, to throw his oath into the scale.

Having disposed—how satisfactorily the general assembly will determine—of the only two objections made to the change, let us inquire what are the advantages proposed by its adoption. In order fully to appreciate these advantages, we must consider the objects which a wise legislator ought to aim at in providing a mode for the decision of contested rights. These are, that no one should be vexed by the commencement of unjust suits; or delayed or defeated by a false defence in the prosecution of those which are well founded. The means to attain these important ends are, first, that the language of all law proceedings should be simple and certain, neither involved in the mystery of technical language, nor disfigured by ridiculous fictions; that there should be as much celerity as is consistent with proper deliberation; no more than inevitable expense; and that every suitor should be responsible for every injurious act wilfully committed. To effect which last and important purpose, it is essential that, as far as possible, there should be no intervening party between him and the judge. Without this responsibility how can any of the great objects of practical jurisprudence be obtained? A frivolous suit is commenced, to the great injury of the defendant. The plaintiff says, truly, “I never saw the declaration that has been put in.” Or, he may say, “I did see it, but I did not understand a word it contained. My lawyer signed it, and told me it was in the necessary and usual form. If it contains falsehoods, I am not answerable for them.” This would be a good excuse for the client, and the advocate might avoid all responsibility by alleging, that he had only put in technical form the instructions of his client. The proposed change avoids this difficulty. It secures responsibility, when the client is obliged to attest what he alleges on oath; when he is told by the magistrate, who administers it, “Take care that you tell nothing but the truth, for your falsehood will incur the punishment of perjury. Take care you tell all the truth, for what you may endeavour to conceal, will be brought out on a cross-examination before the judge who is to try the cause, and the public who will

form their opinion of you from the correctness of your assertions." In the face of these cautions, falsehoods and vexatious suits will be extremely rare. Responsibility, under this arrangement, can no longer be shifted off; and the certainty and simplicity, so desirable in legal language, will be inevitably attained. We have the honour of being the first in the union, and that in the incipient state of our freedom, while we were yet a territory, to reduce legal procedure to a degree of simplicity unknown, perhaps, in any other country (a): and if the plain intent of the laws for that purpose had been adhered to, in practice, this strong reason for the proposed change would not exist. But, although those laws directed the parties to state the facts on which they relied, according to the truth of the case, with the necessary circumstances of time and place, yet imperceptibly all the common law counts came to be introduced; and instead of a plain statement, which every body can understand, of the manner in which, and the time when, and the place where, a sum of money became due from the defendant to the plaintiff, we have a number of counts, as they are called, contradictory to each other, but all relating to the same transaction, and unintelligible except to the initiated. Counts for money had and received, for money lent, money laid out and expended, as a groundwork, on which is raised the super-structure of an alleged promise to pay, never necessary to be proved. The necessity of swearing to the truth of the demand will, as a

(a) While the practice under the territorial law, which the reporter prepared at the request of the legislative council, was uncorrupted by the introduction of the common law counts, a young gentleman, from one of the Atlantic states, applied to him to be admitted into his office for the purpose of becoming acquainted with the routine of practice, previous to his examination; and inquired, with much apparent solicitude, in how long a time, with great assiduity, he might hope to make himself master of its intricacies? The answer was, "It is not easy to calculate to a minute, but if you call on me to-morrow at two, as I do not dine until four, I believe the task may be accomplished before we sit down." The surprise of one, who had just passed some laborious years in learning the fictions of the common law, may easily be conceived at this reply, in which there was little or no exaggeration.

first advantage, bring back the practice to its original purity, and banish the fictions which the common law education of most of our lawyers has introduced. The suitor is required to swear, not merely that the material facts in his pleadings are true, which he frequently does on the statement of his advocate, that the parts which he does not and cannot understand are matters of form only, but he must swear to the truth of the whole allegation; and, in order to do this, he must understand what is alleged; but, to understand it, it must be written in plain and simple language, according to the fact. Thus several important points are gained—clearness, simplicity and the absence of all technical jargon in your proceedings. But this is not all. To diminish the number of suits has always been, professedly at least, a great object with lawgivers; but unfortunately they have imagined only one mode of effecting this; increasing the expenses, vexations and delays of applications for justice. Suits will certainly be diminished in number, if to recover ten pounds, as in England, a disbursement of that or a greater sum is required. But it is not the interest of any state that suits should be diminished in that manner. Its true interest is, that every man should be deterred from asking what he has no right to receive; but should recover what is due at the smallest possible expense, and with the least degree of vexation and inconvenience; and that no man should be encouraged by the uncertainty of the law, or the hope of gaining an unfair advantage, from any defect of form or want of evidence in the prosecution, to withhold a just debt, or compensation for a wrong. The proposed alteration, it is thought, will most materially lessen the number of suits; not by a denial of justice, but by its certain, easy and cheap administration. This will be effected in the following manner.

First, all those suits will, it is supposed, be completely prevented, or so nearly prevented as to be reduced to a most inconsiderable number, which are brought without any other object of success than that which arises from the defence of the supposed want of the necessary proof to discharge

himself from an apparently just demand ; for instance, the plaintiff having the evidence that a sum of money was once due to him, but having reason to believe that the defendant has lost the evidence which had been given of its discharge, brings his experimental suit, which he gains if his conjecture of the loss of evidence was well-founded ; and if he finds himself mistaken, he loses nothing but the costs. Now, suppose this plaintiff obliged, before he can commence his suit, to make oath to the truth of the charge, will he risk the searching interrogatories of his adversary, the danger of the evidence of the discharge being produced, the punishment, the infamy, that will await his detection ? Certainly not. This whole class of cases, then, may be considered as struck off from the docket.

Next to those are the less numerous cases in which suits are brought merely for purposes of vexation. As greater risk, nay, a certainty of failure, must attend these, and the same consequences follow the support of them by a false oath, we may as reasonably suppose that these also will be swept away.

In the cases considered, the party is supposed to be conscious of his want of merits. A most numerous class is composed of those in which, from irritated feelings or false information, he really believes himself injured and entitled to relief. Under these impressions he has nothing to do but to direct the suit. The man who stands between him and the judge, for the most part, does not examine very closely into the proof by which the suit is to be supported : it is not his interest to do so. He commences the suit ; and to commence it he has no need in other states, in any case, and since the introduction of the common law counts, he has no need in many cases here, of any precise information as to the cause of action. He files his petition, stuffed with a variety of counts or statements, some one of which he hopes the evidence will fit ; and when, in due time, the cause is ready for trial, he begins to call for the testimony, and finding that it will not support the cause, it is either dismissed, continued with the vague hope that some evidence may in time be dis-

covered, or it is brought on with no prospect of success but that which the uncertainty of the law will afford. Instead of this careless, precipitate mode of proceeding, impose the necessity of such a precise statement as must be attested on oath and supported by the examination of the party making it under the interrogatory of his adversary, and the causes of this description also will be greatly diminished in number.

There are other causes which may be readily supposed will, under the proposed regulation, restrain plaintiffs from bringing experimental, vexatious and hasty suits. The same causes will operate on defendants to make compromises and settlements before suit brought, or prevent a frivolous or vexatious defence afterwards. It will no longer be sufficient for an attorney to say for a party, that he owes nothing, or to put in any other plea or allegation that he knows to be false, in order to retard or avoid the payment of a just debt; or the performance of any other legal obligation. The previous oath, the all-searching subsequent interrogation under the inspection and in the hearing of the public, will effectually prevent any false pretence being made. The creditor, not being irritated by the delay, the vexation and the expense of a groundless defence, will be more lenient; and the debtor, knowing that he cannot rely on these shifts, will be more punctual; and thus the same measures which facilitate the recovery of a legal demand, will prevent those from being made which are unfounded or vexatious.

Having demonstrated, as it is hoped, the utility of requiring that all the judicial allegations of the parties should be substantiated by their oaths, under the correctives of publicity, cross-examination, and the right of interrogation given to the judge and the jury; and having pointed out the analogous reasoning which would require the admission of the testimonies of the parties in the cases in which that of interested witnesses is permitted; it remains only, under this head, to give the reasons why the code has not permitted the parties to offer themselves as witnesses in all cases without restriction. It has been

a principle, in preparing this plan, not to be deterred from proposing any useful change by the mere consideration that it was new ; but, at the same time, to respect existing institutions, so much as to innovate no further than was necessary ; and never where the useful end proposed could be obtained without shocking established opinions or prejudices in favour of known forms, although they might be, in some degree, inconvenient.

In the present instance, the maxim, that no one should be a witness in his own cause, had been so long established, as a self-evident proposition, that it was supposed much more feasible to add to the exceptions, which, as we have seen, were admitted in practice, than to deny its truth ; while, at the same time, nearly all the advantages that could be expected from abolishing it entirely, were secured by the extensions which have been enumerated ; to which may be added, that although the party cannot, except in the cases and in the manner specially provided for, support his case by his own testimony, yet the faculty given to the judge and jury to examine him, will in very nearly all cases supply the deficiency ; because, having his oath in support of his own statement, as set forth in the pleadings, if that statement should be denied or explained away by other testimony, the judge or jury will naturally apply to the party to know how he accounts for the difference, and thus he will have the same advantage which a right to offer his own testimony would give.

The exclusion of interested testimony having been examined, and found to be injurious to the investigation of truth, and its admission to be attended with no inconvenience which may not be reduced to one of a quantity that has no assignable value ; it, of course, finds no place in the proposed code ; and with it disappears one of the most fruitful sources of uncertainty, expense, delay and inconvenience in the law.

If the search after truth requires that interested witnesses, and even the parties themselves, should be interrogated to discover it, are there any relations, in which the offered witness may stand to the parties, that

ought to exclude his testimony? By the English law, and of course, in the several cases which have been noticed, by ours, there are several: husband and wife—attorney and client—parties in the same cause.

1. The code now offered does not contain the exclusion of husband or wife, as witnesses, for or against each other; because the reporter does not find any one sufficient among the reasons by which it is supported in the English decisions or commentaries. The first of these alleged reasons is, that their "interests are identical" (*a*). But in a system which discards interest as an objection to competency, this reason falls of course. The second is said, by the same authority, to be "on grounds of public policy," to prevent distrust and dissension between them, and to guard against perjury. It is said, that individual interest and individual rights may sometimes, by a wise legislation, be made to yield to the good of the whole community, which is understood to be meant by the expression "*public policy*;" but those cases are not numerous, and generally admit of compensation, and ought only to be allowed when the public advantage is evident and so important as greatly to overbalance the individual inconvenience which is incurred to promote it. In the case before us, the public evils are designated: first, the danger of domestic dissension; secondly, the danger of perjury. The first, if the evidence should be against the party connected with the witness; the second, if it should go to exonerate him. The argument supposes, that if the husband or wife be called as a witness in a suit to which the other is a party, one of two things must happen; either unfavourable truths will be told, which it is said will disturb the family peace; or perjury will be committed, to preserve it. Now these are two opposite and contradictory reasons. If the danger be, that family dissensions will grow out of the testimony, then that of perjury is avoided; if the danger be perjury, then that of family discord need not be apprehended. But legislation must be founded on the general application of

its reasons ; not on the tendency of its measures to good or evil in particular instances. If the connexion by marriage be so close as to make the parties incur the danger and disgrace of giving false testimony for the other, then let the case be examined solely with a view to the evil of placing the witness in a situation where strong motives are offered to him to commit a crime. If the predominant risk be that of destroying domestic harmony, let that be assigned as the reason. But to allege both, when they are contradictory, is a strong presumption that neither can safely be relied upon. Both, however, will be examined, and both contrasted with the evils which attended the exclusion.

First, let us suppose that domestic dissension is the danger ; that is to say, that one spouse will quarrel with the other for telling the truth, in a court of justice, when it makes against the interest of the other. But in most cases the interest is common between them ; therefore, there is little probability that any ill will can be created in the mind of the one against the other for not committing perjury, in order to protect a common interest. The supposition that a domestic broil may ensue from a cause like this, is to suppose the party raising it corrupt, in expecting falsehood from his or her spouse, and malevolent in resenting his disappointment ; and the law cannot reasonably be required to make any great sacrifice for preserving the harmony of so ill-assorted an union as that which such a case supposes. The dissension arises from the performance of a duty—bearing open testimony of the truth ; and avoiding a crime—the commission of perjury : and, because a brutal, corrupt, or passionate husband may quarrel with his wife for avoiding the crime, shall the law declare, that the wife shall not perform the duty ? It will watch over domestic peace by punishing those who disturb it, and, for proper causes, by dissolving the bond of an ill-assorted connexion : but it ought never to say, the one party shall be exempted from the performance of an important public duty, because the other is tyrannical and unjust. The argument supposes, too, that there is greater danger to domestic happiness from this than from any

other source; but is there any foundation for the belief? Not one case in a thousand, it is believed, will occur in practice where any improper excitement will be created by an adherence to the truth, although it should militate against the wife or the husband of the party who states it. Why should it more in this case, than in that of any other witness? Mutual affliction, the knowledge that it was the performance of a duty required by law, and that it could only be avoided by a crime, are so many and such cogent reasons to prevent ill-will on the occasion, that it is astonishing how this reason could find favour with the great lawyers who have assigned it as an argument in favour of their rule; more especially when they themselves most explicitly discard this reason by declaring, that the wife shall not be allowed to appear as a witness against the husband, even if he consents, or after a divorce; nor against the interests of his heirs after his death (*c*). How connubial happiness can be disturbed by a compliance on the part of the wife with her husband's request while united, or by any act after the connexion has been dissolved by death or divorce, these learned doctors of the law alone can explain.

Examine the opposite reason—the danger of perjury; that is to say, the matrimonial union is so strict, that the one party to it will incur all the dangers of punishment and infamy rather than tell the truth when it is injurious to the other; and the law, it is said, holds out this irresistible temptation to the witness when it permits him to be examined. Yet, by the preceding argument, the temptation is easily resisted, the truth will be told, and this strong connexion is so weak, that it is broken merely on that account.

But the arguments must be destroyed, not by opposing the one to the other, but both of them to the truth. There is no doubt that in this, as in many other cases, minds may be found that will waver between the declaration of truth that may hurt their interests or their feelings, and

the assertion of a falsehood that, in their opinion, may secure both from injury ; but can the law be said to hold out a temptation to perjury when it orders a party, under those circumstances, to tell the truth ? If there were no temptations to conceal the truth, or assert a falsehood, there would be no need of oaths. Oaths, and the penalties for breaking them, were made for the purpose of counteracting that disposition. If they were to be dispensed with in cases where that disposition exists, there would be no need for them in any others. In every such case, then, it may with equal reason be said, that the law holds out a temptation to perjury, because it exacts the oath to tell the truth, when there is an inclination to conceal it ; and the argument would extend with equal reason to the abolition of oaths, and the penalties for the breach of them. This exclusion is at variance, too, with other provisions of the law as they already exist. The party himself may be interrogated in chancery in England, and in all cases at law here. The wife may be interrogated to support an accusation made by herself against her husband for a personal injury, in some cases affecting his life ; yet she is not permitted to prove a fact that would save him from an ignominious death, on a charge brought against him by another. Now in all these cases the danger of perjury is equally great, or greater, unless we suppose the attachment of a wife to her husband's interest superior to his own ; or her desire to make good her own charge less intense than that she would feel to support the accusation brought by another. The danger of perjury is no greater in this than in other cases in which it is incurred, without scruple, in the dearest connexions of nature ; father and son, mother and child, brother and sister, friendships of the most intimate kind, habits of intimacy during a long life—the parties to all these are every day arrayed for and against each other as witnesses, and the law interposes no other safeguard to their consciences, than its penalties, and the danger of infamy by detection. No rule of exclusion protects the witness against the influence of his affections or his in-

terest. He is heard, and the degree of connexion is weighed against his character and the probability of his story; the counsel cross examine, the public inspect; the jury interrogate, and deliberate, and determine; and no inconvenience is felt in those cases. Why should there be in this?

Having stated the general principle, that every party to a suit has a right to all information in relation to his cause, of which he ought not to be deprived but for reasons of great public or private inconvenience; and examined, by discussing the reasons for exclusion in this case, whether it offers any such inconvenience; let us now examine the particular evils attached to the rule as it now stands.

In criminal cases the evil is most apparent. Suppose the husband accused by positive, but perjured testimony, of a crime affecting his life, and the wife the only witness of a fact that would prove his innocence; no matter what circumstances she could adduce to corroborate her testimony, no matter what intrinsic evidence it contained, no matter what perfect conviction it would produce of its truth, it is sternly excluded; and the innocent husband is executed because "*public policy requires that the peace of families should not be disturbed, and that no temptations should be held out to perjury.*" In this case, by no means an improbable one, there is positive evil, cruel injustice, heart-rending distress; in the case which the law attempts to guard against, inconvenience only, if it occurs, but an inconvenience highly improbable to happen, inasmuch as it is supposed to affect domestic union; and as it is believed to be a temptation to perjury, not one strong enough to produce the effect, or should it be yielded to, would be capable of detection by the usual means. But even without supposing the extreme case of life or death, the suppression of testimony is, in all cases, an evil; and the law deprives the party of a certain right, to avoid a *technical* inconvenience. *It is* *not* *the* *suppression* *of* *testimony* *is* *in* *all* *cases* *an* *evil* *; and* *the* *law* *deprives* *the* *party* *of* *a* *certain* *right* *, to* *avoid* *a* *technical* *inconvenience.* *It* *is* *not* *the* *suppression* *of* *testimony* *is* *in* *all* *cases* *an* *evil* *; and* *the* *law* *deprives* *the* *party* *of* *a* *certain* *right* *, to* *avoid* *a* *technical* *inconvenience.* *It* *is* *not* *the* *suppression* *of* *testimony* *is* *in* *all* *cases* *an* *evil* *; and* *the* *law* *deprives* *the* *party* *of* *a* *certain* *right* *, to* *avoid* *a* *technical* *inconvenience.* *It* *is* *not* *the* *suppression* *of* *testimony* *is* *in* *all* *cases* *an* *evil* *; and* *the* *law* *deprives* *the* *party* *of* *a* *certain* *right* *, to* *avoid* *a* *technical* *inconvenience.* *It* *is* *not* *the* *suppression* *of* *testimony* *is* *in* *all* *cases* *an* *evil* *; 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is the only witness to a murder which he has committed. This I consider the strongest ground for the exclusion ; it enlists the feelings, and they are most frequently found on the right side. Shall a wife be forced to give testimony that will condemn her husband, the father of her children, to infamy and death, or take refuge in the crime of perjury to avoid it ? I confess that if the alternative could be avoided, a humane lawgiver would not enjoin it ; but if sympathy for individual distress should not be entirely rejected, it ought never to be entertained when its indulgence would lead to more extensive injuries to the community. A wise and provident legislator must have the consequences of every legal provision as present to his mind, as its immediate operation is to his senses ; and in applying this rule to the subject under consideration, he should not, in tenderness to the feelings of conjugal affection, permit the husband or wife to escape punishment for a crime, or defraud another of his right, by declaring that the only witness of the offence, or the wrong, shall not be heard. Some crimes cannot be perpetrated without the aid of an accomplice. The accomplice may betray the principal. The fear of this treachery, in many instances, may prevent the crime ; or a person may not be found willing to engage in the enterprise. But, by the rule of exclusion, the law furnishes an assistant, who can never betray, and one who is always at hand ; and thus gives a facility to the commission of offences which no other circumstance could possibly offer. Besides, public justice requires, and common sense would seem to point out, that those persons who are the most likely to be acquainted with the fact should be first called on to prove it ; but who so probable to know the guilt or innocence of the party accused as the companion of all his hours, the depository of his most secret thoughts ; and what better calculated to prevent an intended crime, than the knowledge that those from whom it is so difficult to conceal it, may be made the unwilling witnesses of its disclosure ? Precisely in the proportion that a man would be encouraged to commit a crime by the knowledge that the person to whom he finds it

necessary to confide it cannot become a witness against him, will be his fear of committing it, when he knows that there is no person in whom he may confide that may not be forced or be willing to betray him.

So sensible of this have been the judicial lawgivers of England, that they have imposed no bar to the receiving the testimony of father and son, mother and daughter, brother and sister, and all the other relations of consanguinity or affinity. They have had no regard to the confidences of friendship, and have thought that the affections of nature, as well as those of habit and sympathetic feeling, should afford no obstacle to the attainment of the ends of public justice. They have gone farther, and made an exception to the rule which they laid down as one inviolable, even by consent (*a*), in the case of husband and wife; and as we have seen, have allowed the wife to be produced as a witness against the husband on a prosecution for an injury done to herself. Now mark the reason! It is a convenient and a ready one: from the "*necessity of the case*;" which must mean, if it mean anything, that there is a necessity that crimes should be punished, and that unless the testimony of the wife were admitted, they would, in those instances, be unpunished. Now, admit this reasoning, and see whether it does not go to the utter destruction of the rule to which it is offered as an exception. There is no greater necessity for punishing a crime committed by the husband against his wife than there is for punishing the same crime committed by him against another; and if the wife is the only witness that can convict in the last case, her testimony is as necessary as it is in the first; and being necessary in both, it should not be admitted in one and excluded in the other. But, in truth, the inquiry is never made; and in this, as in all the other cases founded on the convenient argument of necessity, although there may have been twenty other witnesses present, the pretended necessary witness is admitted, and although there may be none but him

conversant of the fact, he is rejected where it has not yet been deemed convenient to admit the argument of necessity.

2. The advantages of receiving testimony from this source so greatly overbalance its evils, and the inconveniences and the injustice of rejecting it are so manifest, that I have not hesitated to give this exclusion no place in the code. Not so with that arising from the next relation—that of counsel or attorney and client. In this I have offered little or no alteration to the existing law, as laid down by the latest decisions ; and this course has been the result of much reflection, and has been preceded by more doubts of its correctness, than I have found on any other provision of the work. Although I have earnestly endeavoured to discard all unfounded prejudices in favour of established and injurious errors, merely because they were established, it is yet possible that I may not, in this instance, have succeeded, and that ideas entertained during a professional course of more than forty years may have so fastened themselves upon the mind, as to give them a force they are not entitled to, and induced me to retain a provision which ought to be abolished. The legislature must judge of this; and that they may do so, the arguments, which besides are not devoid of interest, for abolishing and retaining the provision must be stated.

The foundation for the reasoning against the exclusion is the acknowledged principle, that in judicial proceedings everything calculated to bring the mind of the judge to a just conviction of the truth ought to be produced, unless the evil of its production should be greater than the good to be expected from it. In this case, say the arguers on this side of the question, the evil is all on the side of the exclusion. The object is truth ; who so like to know it as the confidential adviser of the party ? If the client have a just cause, the advocate can disclose nothing to his prejudice. If he is in the wrong, there is no reason why it should not be disclosed. This is the great object of the law ; nor will it be attended with that which the advocates for exclusion consider as the great evil, the violation of

confidence; for all the communications between client and counsel will be made with the knowledge that, if called on, the latter must declare them. The exclusionists, say their opponents, seem to consider that the great object of the law, in criminal cases, is the escape of the guilty; for their objection is founded on the supposition that the client has confessed his guilt to his legal adviser; and their rule is framed in order to conceal that confession, and thus to favour his escape. Whereas, its sole aim is the punishment of guilt; and the confession of the party being the strongest evidence, ought not to be suppressed. So far, they add, from the declarations being dangerous to innocence, it is one of its strongest safeguards. If the client be really innocent, he will make no confessions; and the declaration of his counsel that he has made none to his professional friend cannot but be a presumption in his favour. Nor is there anything derogatory to the dignity of counsel, or that ought to affect the delicacy of his feelings, to be called on for the confessions of his client. As a minister of the law, his desire must be that it should be faithfully executed; and whether conviction takes place on his declaration of a fact communicated by his client, or known from any other source, is perfectly immaterial in both cases. He does his duty in declaring the truth, and he ought to feel equally free from self-reproach in both. On the contrary, the profession is degraded by making the advocate, in effect, the accessory after the fact, to a criminal, by aiding him to escape the penalty of the law, with a knowledge that he has incurred it. Why, too, it is asked, will you extend this privilege to attorneys and counsellors, when you deny it in the case of physicians, friends, or the nearest relations? In these cases there is mutual confidence reposed, and in many instances, necessarily reposed; yet there is no exclusion. Besides, the contract between counsel and client ought to be governed by the same rules that are applied to other contracts in law, and not the legality of their object. A contract to conceal the known operation of law would not be sustained by the courts, but the object of this con-

tract, where the party is guilty, is precisely one of that description, and ought not to have any binding force.

These are the main arguments, greatly abridged and undoubtedly weakened in the operation, by which it is contended, that in all cases the counsellor and attorney ought to be admitted as witnesses against their client. These reasons are forcible, and some of the arguments, at first view, unanswerable; but when maturely considered, they seem to me to rest, for the most part, on the untenable ground that, if the client be innocent, he has nothing to fear from the disclosures of his counsel; and that if he be guilty, he ought not to be protected against them. I have applied the term untenable to this basis of the argument, from a belief that, in many supposable cases, the most perfect innocence may suffer from the disclosure of circumstances necessary to be communicated to a professional adviser. In a civil case, concerning the title to land of which the client is in possession, and which he holds under an ancestor, whose title, though acquired in good faith and for a valuable consideration, is defective in form, the client, ignorant of the forms required by law, thinks the title is good, but having occasion to make some family settlement, shows it to his counsel, who immediately perceives the defect. What is the consequence? Is the professional man bound to secrecy or not? Whatever be the answer to this question, it seems to be decisive, at least in such a case, of the propriety of the exclusion. If he be not bound to secrecy, he may, without blame, immediately communicate his discovery to the party interested, and his innocent and confiding client is ruined. Every feeling of justice, honour and humanity, would be shocked at this; and one of the most ingenious opponents of the exclusion seems to admit, that the uncalled for communication of a fact of this nature would be improper, for he excludes it expressly from his argument, which he confines to the propriety of obliging the counsel to answer when interrogated in court (a). But if the counsel be bound to

(a) Editor of Bentham's *Rationale of Ind. Trial*, 5th vol., page 315.

secrecy before the trial, why should he be absolved from the obligation on the trial? To admit the obligation out of court, is to acknowledge that it arises from some professional duty: and if it be a duty, it ought to be enforced at all times and in all places, for it would be a strange provision which imposed secrecy under pain of disgrace, and perhaps the censure of the court, for communicating that at one moment which the next is directed to be proclaimed to the world. For if it be a duty to keep the secrets of a client, it must be a professional duty, and can only be founded on the injury that would arise to him from the breach of his confidence. But the greatest of all injuries would be caused by bearing testimony to the fact he wished to conceal. Therefore, to admit that there exists a professional duty to keep the communications of a client secret before a trial, is *à fortiori* admitting that the same duty requires them to be kept secret at all times when the communication of them would injure the client. It does not appear to be a fair answer to say, that the client himself might be forced to declare the fact upon oath, and that, therefore, there can be no impropriety in drawing the same declaration from the counsel: for, by the case supposed, and others which might be put, the adverse party had no notice of the defect, and therefore could not have made it the foundation of his suit: and the client himself being ignorant of the want of form in his title, could not disclose it.

Again, take a criminal case. Money has been stolen, consisting of coins not very common in the place where the fact occurred. The accused has been seen to pass some pieces of the same description; other circumstances cause him to be suspected. He has no proof of the manner in which he acquired the pieces in question. He is innocent, but he confesses to his counsel, that about the time of the loss he was in the chamber where the theft was committed. All other circumstances would not be sufficient for this confession, but this added to them, would have that effect, and there is no other proof but what he communicates to his counsel. Shall he be forced to raise

the conviction of the innocent man whom it is his duty to defend? That the testimony of any other, to whom the prisoner may have made the same confession, would have the same effect will scarcely be deemed a good answer, because the case supposes that he has made no such communication; and because it was necessary to state his whole case to his professional adviser; but no such necessity existing as to any other, it would have been an act of imprudence to do so, for the consequences of which he could not blame the law. We must suppose, say those who argue against the exclusion, that all laws are good, and, of consequence, that they ought to be executed; and the truth, by whatever means brought to light, can never injure the innocent, because no good law can ever direct a punishment to be inflicted on any but those who are convicted on true testimony. The disclosure of the truth, therefore, can only injure the guilty, whom it is the object of the law to punish, but the innocent have nothing to fear. But the question does not turn on the justice or injustice of the law, but on the sufficiency of the evidence to show a breach of it. The law, in the criminal case supposed, that forbids theft, is a good law and ought to be executed; but the effect, upon the minds of a jury, of the circumstantial evidence, adduced to show the guilt of the accused, cannot be regulated by law; and the true circumstance of the presence of the party at the place where the fact was committed, might lead to a false conclusion that he was the offender, and therefore might, with great propriety, be convicted. So in civil cases, circumstances of common occurrence may be supposed, which, though true in themselves, might probably lead to a false conclusion; and which therefore could not, without injustice to the client, be disclosed by his advocate. An estate depends upon the question of the sanity of mind of a testator. The law annulling testaments made by persons labouring under insanity is a good law, and ought to be executed: yet a defendant, holding lands under a testament made by a person of sound mind, may communicate circumstances, such as acts or speeches of the testator, out of the com-

mon course, which to a jury, ignorant of his habits, might seem indicative of derangement; and thus endanger the client's good title. If it be said that in all these and other cases that might be imagined, the reaction of the circumstances would be accompanied by a denial of the main fact which they might render probable, and that as it is a rule that the whole confession must be taken together, the danger would be obviated; it is answered, that the rule cited is a good one, but that there is a general disposition to believe so much of a confession as makes against the party, and to disbelieve the rest; and that moreover the client, in a confidential conversation with his counsel, might not always so connect the parts of his communication which were injurious to his interests with those which supported them, as to render them inseparable, and that if they are not so connected, the rule will not apply.

All the reasoning hitherto has been under the improbable supposition that, if the law were changed, the client would go on to make, and the advocate to receive, the confidential communications in question. But take away the rule of exclusion and what happens? The client does know, or does not know, that his counsel is obliged to discover all he may communicate to him. If he do not know it, but proceeds to state circumstances that show his guilt, what is the counsellor to do—stop him short by a refusal to hear the story? But why should he do this? If the duty of carrying the law into effect obliges him to disclose what he hears, the same duty should induce him to listen to the communication. Remember also the principle is, that no dishonour should be attached to any thing that enforces the execution of the laws, that this is the first duty of a good citizen, and that it must follow, as I have said, that the counsellor is as much bound to listen to the communication as he is to disclose it afterwards. Now, I think it has been sufficiently shown, that, in a legal obligation to state the confession when interrogated, there is a moral obligation to discover it before the interrogation, because they both stand on the same foundation—the duty of carrying the laws to be

executed ; and, indeed, the voluntary revelation, if it be a good act, would be more meritorious than the forced discovery under interrogatories : and the consequence is, that the professional man of high honour, selected by the accused to defend him, or assigned by the court to that honourable office, must listen to the story of his confiding client, must treasure up the circumstances which tend to inculpate him, and then hasten to the public prosecutor with the information he has thus obtained. What man of humanity or honour would accept of such an office ? The laws must be executed—yes ! but by such means as are not repugnant to those sentiments of self-respect which every good citizen ought to entertain. To creep into the confidence of even a guilty man, under pretence of being his defender, for the purpose of bringing him to justice, is an act that never can be viewed in a moral or respectable light. A public enemy must be destroyed, but not by poisoned weapons, the means, in both cases, are more injurious than the end is useful.

Take the other, and the more probable, alternative. The law is known to both client and lawyer, and what happens ? There will be nothing communicated, and the advocate will have nothing to declare. Public justice, then, acquires nothing by removing the rule of exclusion. But is there nothing lost on the score of humanity ? Are no advantages taken from the innocent by this fruitless attempt to gain one over the guilty ? The advocate warns the client not to utter anything that may injure him on the trial. The client replies : “ In order to enable you to make my defence, I wish to lay before you the whole transaction in which this suit, or this accusation, is founded ; but I am an ignorant man. I do not know whether some of the circumstances I may relate cannot, by the ingenuity of my adversary, be made to bear against me. It will be best, therefore, for me to keep them to myself. I must forego the benefit of your advice, because I cannot, without fear of being entrapped, tell you all you ought to know.” Thus the great benefit which is the boast of modern criminal law, allowing counsel to the accused,

is in most cases impaired, in many rendered of no avail. In the work to which I have before referred (a) it is acknowledged, that, if the exclusive rule were abrogated, no confessions would be made, and, of course, little or no information would be obtained. But it is further contended, that the exclusion creates a combination between client and lawyer, to protect the former, although guilty, from the penalty of the law; that the advocate becomes, in effect, the accessory after the fact, by concealing the guilt which had become known to him, and by aiding the culprit to escape; and thus an act which would be culpable in one, is made the subject of boast in another. There is some force in these observations, so far as they apply to the devices by which solicitors degrade themselves and their honourable profession for the purpose of suppressing or perverting testimony, in order to procure the acquittal of their client, whom they know to be guilty. Whether any remedy can be found for this inconvenience, consistently with the preservation of the rule of exclusion, may, perhaps, be doubtful; but although the secrecy it requires may sometimes be abused in this manner, yet it is not the necessary consequence of it. An honourable and conscientious advocate may contend for the acquittal of a client whom he may yet, from circumstances disclosed to him in his instructions, believe to be guilty. He may, under the operation of the present rules of evidence, do this from two considerations; first, because he cannot properly make himself the judge of the man whose case he has undertaken to defend, not to decide upon. Secondly, because, while the rule of exclusion lasts, the confession of the accused to his counsel is no evidence, and it is the professional duty of the advocate to see that the accused is condemned by legal evidence only. This supposes no other combination between client and counsel than one which goes to support, not to defeat, the law. If the evidence, independent of the confession to counsel, be defective, and the confession be no evidence, surely there

(a) Editor of Bentham's *Revis. Ind. Procl.*

is no immorality in urging an acquittal. On the contrary, the immorality and illegality would be in procuring a conviction which was not justified by legal evidence. The repeal of the rule of exclusion, then, is not required from this consideration; and not believing that any positive good would result from its abrogation, it has been retained in the code—but confined strictly to cases of communication for professional aid, either in the conduct of, or preparation for, a suit or defence, or for advice in some *lawful* occasion.

3. The next exclusion of testimony applies to religious confessions, made to a priest of the Catholic religion. The reasons for this are obvious. To force the disclosure, if it could be done, would be a tyrannical invasion of the rights of conscience; and the law would be useless if it could be executed; because, in that case, as in the case of counsel and client which has just been examined, no confession would be made, and there would be nothing to disclose. But, independent of the protection of the religious duties and opinions of a numerous class of our fellow citizens, much positive good has resulted from the institution of this religious rite: confession is calculated to produce repentance and reformation; crimes have been prevented, restitution made, and unjust litigation averted, by its means; and moreover, the penance imposed by the priest, furnishes the means of inflicting some penalty for offences that, being unknown, would otherwise be unpunished. This rule of exclusion is not acknowledged by the English law (*a*), although it has been enforced by a decision in the state of New York (*b*). In confining this protection to the priests and penitents of a particular sect, I was guided by the belief that, in no other sect, was auricular confession made obligatory as a religious duty, and consecrated as one of the solemn rites called sacraments, as it is by that description of Christians. Professors of other religions, and of other

(*a*) 2 Starkie, 396. M'Nally, 258. Peake, 77. 2 Atkins, 524.

(*b*) Smith's case. Philip's case.

sects of the same religion, may seek to disburthen their consciences by confession to a minister or priest, but as secrecy in those cases is not a religious duty in the clergyman, his conscience would not be violated by exacting a disclosure; and as the confession is not obligatory on the penitent, it must be considered as a voluntary communication, and it would be difficult to draw a distinction between this and any confidential confession to another individual. Whenever a religious sect shall arise, among whose tenets confession is held to be a religious duty, and concealment of the matter in confession an obligation of the most sacred kind, then the same protection ought to be extended to the professors and priests of such sect.

4. Other descriptions of persons, excluded from testifying by the English law, and of course by ours, are those who are deemed infamous. We have seen the numerous classes which this vague description embraces in the Spanish law, which, it is necessary to repeat, is also ours in civil cases, and in those of other criminal causes than those designated in the law of 1805. Nor is the legal import of the term well defined by the English decisions (a); so that, if it were proper to exclude the testimony of the infamous, a law would be necessary to designate what persons ought to come under that description. But it is thought that this will be rendered unnecessary, when the propriety of continuing the exclusion comes to be considered.

Let us recur to the position made in the argument against one of the former rules of exclusion, that no man will, without some motive, make a false statement in preference to one that is true; and having seen that, even

(a) Where a man is convicted of an offense, which is inconsistent with the principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony, &c. 2 Starkie, 718. This is the rule on which some decisions have been made by numerous decisions, and it is the rule which the law has the right of declaring any other rule to be inconsistent with the principles of honesty and humanity, and of excluding the testimony of a convicted person.

when that motive exists in the shape of interest, there were so many antagonistic motives always at work as to render it more probable that truth would be extracted from an interested witness, than that he should either endeavour to deceive or succeed if he did attempt it. Having come to this conclusion in cases when the motive for falsity exists, why should we hesitate in a case when no such motive appears? One who has been guilty of falsehood, perjury if you will, ninety-nine times, will tell the truth the hundredth, if he expects no advantage from concealing it or telling a falsehood. Remember that we are now speaking of infamy alone as a ground of exclusion, not infamy coupled with interest in the shape of a bribe, or any other motive directly operating on the witness. To justify the exclusion in such a case, we must suppose that because a witness has, for some advantage received or expected, told a falsehood once, he, without any advantage, to himself without any motive, for ever after will persevere in telling falsehoods rather than truths. Nay, more, we must suppose that after having been detected and punished for the falsehoods which he was induced by the hope of gain to utter, for it is the conviction only which creates the incompetency, he will, without the hope of gain, incur the same risk merely for the love of falsehood. This is so improbable, that some inducement must be added, to render the perjury probable, and justify, on that ground, the exclusion. What shall that be? An interest in the event? But we have seen that this alone is not sufficient cause: nor is the conviction for an infamous crime alone a sufficient cause. If the union of the two produces that effect, then the rule should be, not that an infamous, but that an infamous and interested witness ought not to be heard. But the rule, even thus modified and restricted, would be a bad one, on account of the effect it would have on the right of third persons, and on the security of the person and property of the party who had been convicted. The most approved authorities, from which the rule is derived, add, as the reason on which it is founded, "that the law considers the

testimony of one so convicted as of too doubtful and suspicious a nature to be admitted in a court of justice *to affect the property or liberty of others*" (a). This supposes the testimony of the witness always to be intended to take away the property or liberty of another. But how if its being heard be the only means of preserving property, or liberty, or life itself? How then? Is it of too suspicious a nature to effect these good ends? It would rather seem that the reason may, in many cases, be traced to the inconsiderate legislation of early ages, which made the disability to testify a part of the penalty for the offence, intended to affect the offender alone, without considering the extensive operation it might have on the interests of others; for we find the same clause introduced into modern statutes, adding, after other penalties, "and shall be incapable of testifying in any court of justice." But whatever be its origin, there is no good argument for its continuance. If there are some occasions on which we may choose our own witnesses, there are many others, and quite as important, on which this is regulated by chance. If the only and casual witness of a transaction, on which fortune may depend, happens to have been convicted in this, or even in a foreign (b), country of an infamous crime—no matter what time has elapsed, or what the character of the witness may be—he is incompetent. No matter whether his testimony is corroborated by circumstances so as to render it evidently true, or whether it is enforced by being clearly contrary to his interest, nothing can render it fit to be heard; truth

(a) Starkie, 714, cites Gilb. L. E. 256. 2 Bulst. 154, Br. b. 4, c. 19. H. b. 4, c. 8 Blackstone gives one of those fanciful reasons, too frequently found in his excellent work, in support of the common law rules, that "because the person convicted of an infamous crime could not have served as a juror, he should not be permitted to give evidence to a jury, with whom he was too scandalous to associate."

(b) This point has been differently decided in Massachusetts and in England. In the state last named, the foreign conviction did not disqualify. In the last, it operates as an exclusion. 17 Mass. 515. 2 Har. & J. 279. 1 Har. & J. 572.

itself—evident, uncontradicted, and incontrovertible truth—must not be received from lips that have once been polluted by falsehood, if that falsehood have received the condemnation of law; for, unless sentence have been passed, an hundred falsehoods, proclaimed in the market-place every day of the witness's life, will not disqualify him. But, even in the cases where the witness is selected, there is no security; his previous conviction may be unknown, or a subsequent judgment may incapacitate: and cases are not wanting where testaments, regularly executed in the presence of the requisite number of witnesses, have been set aside (*a*), and the will of the testator disregarded, because one of those witnesses had, either previously or subsequently, been convicted of a crime, the chief punishment for which has thus fallen on the innocent. Even life itself may fall a sacrifice, the life of the innocent, by an ignominious death, to an adherence to this rule, and that by no violent supposition of circumstances. A homicide has been committed which, according to appearances, would be murder, but which facts, known only to the convicted witness, prove to have been a justifiable act; but that witness cannot be heard. Thus fortune, liberty, life itself, are sacrificed to the maintenance of a rule which is absurdly invoked as their support.

5. Thus far the exclusion of the witness has been considered only as it may affect others. But consider the more probable operation it may have on the witness, and through him on the public peace. In the long list of offences against person or property, how many are there to the conviction for which the testimony of the party injured is indispensable? All these may be committed with impunity against a person disqualified by this rule from giving testimony, and thus a short imprisonment, which the law may have affixed as a sufficient punishment for the crime, is changed into an outlawry of the most rigorous kind, by which the party is put completely out of the protection of the law, and subjected to depredation on

(*a*) *Mackender v. Mackender*, Hill. 28. Geo. II. *McNally*, Ev. 208.

property, to insults, to personal injury, and, if a female, to the most brutal violence without the hope of redress.

Here again, as in the case of interest, we find by our present law, exceptions introduced, founded on reasons which apply with equal force to the rule. By statute, in England, a conviction for petit larceny shall not disable the witness; by the court it has been decided, that the affidavit of a person incapacitated as a witness by conviction for perjury shall be received as evidence, in defence of a charge broug't against him; the judge. Holt, making this natural reflection—"because he has been convicted of perjury, must he, therefore, suffer all injuries and have no way to help himself?" Yet it never occurred to the learned judge, that this effect which he agreed to give to the convicted defendant's affidavit, for a purpose which concerned himself, and where, of course, the two objections of interest and infamy were combined, ought to be extended to the case where the interest or the life of a third person were in jeopardy, and where the convicted witness had no interest to disguise the truth. Still less did it occur to him that the very words of his decision would permit the convicted person to make a complaint for an injury done to himself, or to support the prosecution by his oath, the only testimony, perhaps, in existence; for it is only in the case of an affidavit to be used on an incidental question, that the exception is made: a case which, of all others, ought not to have been made an exception; that of affidavit, made with deliberation, in secret, and attended by no opportunity for cross-examination. Therefore, we have the strongest case in favour of the rule made an exception to it; and the rule itself applied to those only where there is the least danger from the admission of the testimony.

Another, and no less incongruous, exception is, that made in favour of the accomplice, who is every day admitted to testify against the principal. Here we have the highest of the high—~~the~~ the hope, often the assurance of pardon—joined to the acknowledged infamy of a crime, and yet the witness is heard.

For what reason, if the general rule of exclusion be a good one, should the exception be made? Necessity? What necessity? The necessity of convicting the accused by false testimony; for it is on the supposition that it will be false that you exclude it in other cases. If the evidence be too suspicious to be heard to preserve fortune, liberty, or life, can it be pretended that there is a necessity for using it for depriving one of these blessings?

The uncertainty of the rule has been hinted at, as one of the reasons for abolishing it. To what offences shall it apply? Particular circumstances, enumerated in different books, all agree that felony is one of them. This comprehensive and ill-defined term embraces so many acts, each employing a different degree of depravity, from treason down to petit larceny, that it cannot well be conceived that all suppose the want of veracity in those who are guilty of them, more especially of a general disposition to utter falsehood or conceal the truth, without any special motive. To preserve the rule, therefore, with any appearance of consistency, it must be modified: a line must be drawn between such offences as suppose a particular proneness to falsehood, and those which evince only other species of depravity. To have taken the losing side in a political struggle and have incurred the crime of treason, certainly does not create a presumption of the disposition to perjury; and perjury without motive, for the purpose of depriving an innocent stranger of his fortune or his life, or for the destruction of his reputation. We must distinguish: and when we come to analyse the different offences, in order to discover in which of them lies this latent disposition to mendacity, we shall find it in none, and we shall come to the conclusion at which I have arrived—that the exclusion, in this case, also, ought to be abolished.

6. One more ground of exclusion remains to be discussed: that arising from religious opinion. The doctrine on this subject, after having gone through several changes, is settled, as far as any thing depending on judicial decisions can be settled, into this rule, that a disbelief in a

future state of rewards and punishments is the only cause of religious exclusion. It is certain that this state of the mind destroys one of the sanctions for the efficacy of the oath; but that it is compensated by the additional weight which may reasonably be supposed to be given to one of the others, the moral, honorary, or penal sanction, just as the privation of one sense adds accuracy and sensibility to the others. The man who is so unfortunate as not to believe in a future state, will be conscious of the disadvantage attending this disbelief upon his reputation, and will endeavour, by a more scrupulous attention to his conduct and conversation, to show that his want of faith does not derogate from his respectability. But, without having recourse to this supposition, of an increased force in the other sanctions from the suppression of one, ought we to believe that the man who doubts whether he will be punished in a future state for false testimony given in this, will, therefore, feel himself bound by no obligation to tell the truth; or, to state the position more truly, will, on that account, be more inclined to falsehood than to truth? May he not dread the reproaches of his conscience in this life? May not a moral sense show him the utility and beauty of truth? May not a sense of honour make him disdain the idea of falsehood? May not the fear of infamy or of punishment deter him? No, say the inexorable exclusionists; we must have every security for the truth of the testimony, or we dare not trust ourselves with hearing it; or rather, we must have this, and we will dispense with all the other. A man of profligate character, who laughs at all moral duties; a dishonoured and notorious liar, who has no regard for reputation; a witness who resides out of the reach of the tribunals which might bring him to punishment for his perjury, and therefore has no fears for the consequences; all these may be heard; but the man of honour, of integrity, and the most fearful of the temporal consequences of an abandonment from truth, cannot be heard if he does not believe in the immortality of the soul—a most important state of mind, and certainly not one that can be taken for granted. Belief in a future state must

arise either from reasoning on probabilities, or from a conviction of the truth of revealed religion. Some minds may be so framed as not to yield to the evidence which most of us think sufficient on these points ; but surely an inability to draw a just conclusion from abstract propositions, does not imply such a degradation of moral principle as would render it more probable that, without motive, he would prefer falsehood to truth. The religious sanction is the only one which, by this reasoning, will secure the truth. But yet, you will believe a quaker, who rejects even the form of the oath ; yet you will in a thousand instances, as in custom-house declarations, put no faith in the oath, which is unaccompanied by the other sanctions, and because little dishonour is attached to their breach, and punishment rarely follows their violation. If the truth could be demonstrated, it would appear that the fear of the consequences in a future state is not half so operative, taken by itself, as the fear of dishonour and punishment here. Therefore, in itself, this disbelief does not destroy the credibility of the witness. On the contrary, from the mode in which alone it can be proved, it must add to his credit. To avow this disbelief requires some courage. The atheist is a character not favoured in society. A repugnance to utter a falsehood, for the most part, would be the motive for making the avowal ; yet, the moment he has given this evidence of his regard to truth, he is declared unworthy of belief. If, being an unbeliever, he answers falsely that he believes, he is a good witness. If he answers truly on this point, the presumption is, that he will answer untruly to every other question that may be put to him ; for, remember, that whatever proof you may have to convict him of disbelief, it must all end in that to be derived from his own examination. What he may have said or written yesterday is no proof of his belief to-day. It is the actual state of mind at the time of examination that must be inquired into, and if he believes then, he is a good witness ; and this state of mind can only be known from himself.

In itself, then, the exclusion is absurd. In its con-

sequences it is more dangerous than any we have reviewed. Not only is the unbeliever, in common with the witness convicted of crime, put out of the protection of the law, as to all injuries to his person or property that require his own evidence to punish or redress, not only in this case, as in that, is the party entitled to his evidence deprived of it, when it may be necessary for the protection of his property or his life; but in this case every kind of outrage may be committed, not only upon the person who wants the necessary faith, but in the presence of others of the same description. There is no more risk than if it were committed before so many statutes. All those who, knowing the offender's guilt, might wish to avoid giving testimony against him, but are unwilling to expose themselves to the punishment of perjurers by false testimony, have the ready means of avoiding the examination—an avowal of unbelief is all that is necessary. If it be false, there can be no detection or punishment, for as it is a matter of belief only, no one can contradict this assertion.

There is another view in which the inquiry into religious belief, which must precede the exclusion, appears highly reprehensible. All kinds of religion are, by our laws and constitution, put on a perfect equality. He who believes, he who doubts, and he who disbelieves, have the same civil rights. Every speculation, as to the existence or non-existence of a future state, of the probability or duration of rewards or punishments we may expect there, all the infinite modifications from mere conjecture to perfect faith, are all so many species of religious tenets. No one sect has a right to say to another, mine is the true doctrine, and therefore I am entitled to temporal advantages of which you ought to be deprived. But the right of appearing as a witness against one who has committed a crime affecting the party, is a civil and temporal right; to deprive him of it, for a want of uniformity of faith in any one point with the rest of the community, is to deprive him of it for a difference in religious belief, which is contrary to the constitution and laws.

On these reasons, all exclusions of particular persons,

as witnesses, are abolished by the code, except in the instance of persons insane, and the analogous one of infants whose minds are not sufficiently developed to give information on the subject inquired of. But in these cases modifications of the present law are introduced, which require the attention of the general assembly.

As the law now stands, the court decides on the fact which is to cause the exclusion of the witness; and, although the jury may be quite convinced of the sanity, or maturity of judgment of the witness, he cannot be heard, if the court believes him either to have lost, or not yet to have acquired, the intellectual powers necessary to distinguish and relate the truth. By this code the determination of these questions is vested in those who are to determine the principal question; they are to examine the persons said to be insane, and, if they think it necessary, other witnesses. They are also to examine the infant, and to determine, not by the usual inquiry, whether he understands the nature of an oath, but, by questions which may satisfy them, "whether his faculties are sufficiently developed to receive correct impressions *of the fact relative to which he is interrogated*, to relate those impressions *correctly*, and to feel the obligation of doing it *truly*." These are the only cases of total exclusion. Those who, under certain circumstances, cannot testify, are slaves, in cases affecting free persons; counsellors and attorneys, in the cases before mentioned; priests of the Catholic religion, in cases of religious confession; and parties to the suit, under the modifications contained in the code, and hereinbefore fully explained.

The constitution also creates another partial exclusion, or rather privilege, which a witness has of refusing to give his testimony, whenever the answer to a question put to him will make him liable to prosecution for a crime. It is true, that the words of the constitution only extend this privilege to *criminal prosecutions* and to the *accused*; but the incongruity of forcing a witness to do that which the accused was protected against, seemed to call for the provision contained in the code, which, however, modifies

the rule, as now understood, so as to restrict the objection to such answers only as would furnish evidence against the witness on a prosecution for a CRIME.

To appreciate properly the reduction of the exclusionary rules to this narrow compass, we must not only consider the advantages it will have in the investigation of truth on the trial, which, it is hoped, have been sufficiently demonstrated; but we must also consider the effect it will have in simplifying the law, rendering a recourse to it less expensive, giving it certainty and stability, and diminishing the number of suits. That these consequences must necessarily follow, will be apparent to the most hasty observer. Whoever has opened one of the English treatises on evidence; whoever has looked over the index to a volume of reports, or into any of the abridgments, and examined its contents on that subject, will have seen how large a proportion is occupied with cases in which the competency of witnesses is discussed; not only for causes which would disqualify generally, but for those which make them incompetent to particular points, or in particular suits. Most of the arguments depending on nice, and often fanciful, distinctions, and the decisions doubted, or confirmed, or overruled, according to the judgment or caprices of a succeeding judge, and sometimes, we may venture to say, according to his respect for, or jealousy of, his predecessor (*a*). But when the rule is abolished, all the exceptions go with it, and the simplicity which we have claimed for the new system is apparent. Its certainty and stability are derived from the same source. When the law is simple and precise, the courts can make no exceptions, as they did when they themselves legislated on the subject; and from those exceptions arose all the uncertainty and instability of the law of evidence. I need scarcely add a word to prove another of the characteristics I have ascribed to this change in the law; that a recourse to it would be had with less expense; for a few short articles, and a single page, contain all that must now

See, in the English Reports, the numerous cases before Lords Mansfield.

be sought (and frequently without any certainty of success) in many volumes, and numerous decisions : its probable effect in diminishing the number of suits, has been already, and it is hoped successfully, discussed.

Having determined the few cases in which persons are actually or partially excluded from appearing as witnesses, the code next regulates the manner in which they are to be examined ; and here the entrance into a boundless field of debatable ground is prevented by a provision, that, with the exceptions contained in the articles that have already been examined, and the single additional one in relation to leading questions, every interrogatory, pertinent to the issue, may be put, and must be answered. No more debates as to what is proper evidence in one cause and what in another. The simple inquiry is, will the answer to the question elucidate the fact in dispute ? No rules are given on this point, because none can be framed that would direct the judge through the infinite variety of circumstances in which they must be applied. Whether the question proposed, therefore, is pertinent to the issue or not, is of necessity left in every case to the discretion of the judge.

Leading questions, or those which suggest facts to the witnesses, are forbidden ; but what shall be deemed such is again, of necessity, left to the decision of the court, but with a general direction not to prevent suggestions necessary to recall facts to the memory of the witness when the transaction is remote ; when, from its nature, it was not likely to have made a strong impression on the mind of the witness ; or when, from age, indisposition, timidity, or other cause, his mind is weakened or disturbed.

The witness is also permitted to refresh his memory by written notes made by himself, or another by his direction ; and in all cases, when his testimony relates to accounts or calculations, he is permitted to refer to the papers or books containing them.

He is put under the protection of the court to guard against harsh language, or what is called brow-beating ; and provision is made for giving him time for

reflection when necessary, and for rectifying errors in his testimony.

He who alleges a fact judicially, must, if it be litigated, prove it; but if, in the same manner confessed, no proof need be adduced. If neither confessed nor denied judicially, it must be proved; the oath of the party alleging, in this case, forming presumptive proof.

The rule requiring that the best evidence of the fact alleged shall, in all cases, be produced, is modified and restricted to the following cases:

1. When a positive law has declared, that to give validity to any species of contract, it shall be made in writing, then no other proof shall be admitted; unless it be proved, that the writing was made, but has been casually lost or destroyed, or, without the fault of the party, placed without his reach.

2. When scriptory evidence of the facts has been made, and was in the possession of the party; unless it has been lost or placed out of his reach, in the manner above stated.

3. When positive law has declared certain evidence necessary for the proof of the facts designated in the law.

4. When the fact which is alleged, if true, must have appeared by an authentic act.

In all other cases where evidence shall be produced, which the judge or jury shall deem inferior to other evidence which is not produced, it shall, if legal evidence, be heard, and the nonproduction of the other shall operate as presumptive evidence, to have the weight it may deserve, according to the circumstances of the case, against the party failing to produce it.

These provisions were deemed necessary to avoid much useless and perplexed investigation as to the relative authority of evidence, which frequently causes great injustice in the exclusion of testimony, and always much perplexity in the argument. The first of them was drawn, with the view to prevent the liberties that are taken by courts with the legislative will, as expressed in such laws as are known by the name of the Statute of Evidence in England, and the analogous provisions in the

civil and other codes of law: sometimes enforcing the written law according to its terms; at others, creating exceptions, which weaken, if they do not destroy, its efficacy. Whether the Civil Code itself ought not to contain some exceptions to the strictness of this rule, and whether, while it declares, in general terms, that the omission of formalities shall vacate the act, it should not still provide for the cases where it was not in the power of the party to comply with them, are questions worth considering when the revision of that code shall again come before the legislature. In the meantime its will, clearly expressed, must be obeyed. It is better that individuals should suffer from the operation of a law acknowledged to be bad, than that the remedy should be applied by unconstitutional means. The one is a partial, the other a general and fundamental evil.

The second modification of the rule provides for cases in which the parties have made evidence of their intentions, and reduced the same to writing; in which case testimonial evidence cannot be produced without proving the loss of the writing. In this the present law is not changed.

The two other cases need no explanation.

Another rule of evidence productive of much uncertainty of decision, is that which declares "that parol evidence shall not be admitted against or beyond what is contained in a written act, nor of what may have been said before or at the time of making it." To this, important qualifications are added by the system now proposed. It is confined in its operation exclusively to writings containing obligations or donations, and to testamentary dispositions. These, it is supposed, will comprehend all the cases in which the parties may be supposed to have expressed all they intended on the subject matter on which they wrote. Error, fraud, violence, threats, or any other circumstance that, by the provisions of the Civil Code, would avoid or modify a written contract, evidently ought to be proved by extraneous evidence. Although no party, except in the designated cases, shall

be permitted to qualify, by testimonial evidence, that which he has deliberately committed to writing, yet, as his will constituted the obligation of which the writing is only the evidence, the opposite party may resort to that higher evidence of will which resides in the mind of the other, by calling on him to declare, on oath, what was his true meaning. Circumstances are pointed out which are necessary to be considered, whenever, for the purpose of defeating a contract, an allegation is made of error, fraud, violence, or threats ; but the effect they are to have is left to the discretion of the judges of the fact.

The sanction of an oath, or an equivalent affirmation, is required for the reception of testimonial evidence, from which it follows that one witness, who is himself under that sanction, ought not to state what another had said who was under no such obligation to tell the truth, and whose veracity cannot be tested by cross-examination, or the other means of discovering it. But there are necessary exceptions to this rule, and the code has not left them to be ascertained by judicial legislation. They are the following :

A witness may declare what the party to the suit, his agents, or other persons who could have bound him by their contracts, or those under whom such party claims, have said, when such proof is required by the opposite party. What has been said relative to the matter in dispute in the presence and hearing of one party to the suit, may be given in evidence by the other, as a foundation for a presumption to be drawn from what he said, or did, or from his silence. What a witness has said when he was not under oath may be proved, to show that it was consistent or inconsistent with his testimony. If a witness has been examined on a former trial between the same parties for the same cause, what he has said may be related by another, if such witness be dead, or his testimony cannot be produced. In cases of homicide, when the deceased has said anything respecting the wound, in relation to which testimony may be given in evidence, if his death can be proved from circumstances, it may be given.

taken. When the declarations of a party, or a witness, under the first or second of the exceptions before mentioned, are given in evidence, any thing said by another person, which is necessary to contradict or explain what was said by such party or witness, may be given in evidence. As proof of the hand-writing of a witness, who is dead or absent, may, in certain cases, be admitted as a presumption that he would not have signed if he could not prove the execution; so any material declaration of such witness, to rebut this presumption, may be related. In cases not depending on scriptory evidence, a party is permitted by the code to give evidence of what he himself said or did at the time of the transaction in relation to the matter in litigation, in order to explain his intentions; but in this, as in other cases, he may be examined on the trial by the adverse party. There is a species of evidence that is only acquired by information from others; it is that usually called a fact of public notoriety,—such as pedigree, and other facts of the same nature. These are enumerated in the code, and the proof of them allowed.

A short section declares that the rules for receiving the oral declarations of a witness apply to their examination on interrogatories; and direct, that, whenever the deposition of a witness is taken in writing, the question as well as the answer shall be written, and the answer recorded as given.

This finishes all the provisions of the code in relation to testimonial evidence.

The next head is that of scriptory evidence, which includes all kinds of written proof, except the examination of witnesses when their evidence is reduced to writing; the term *SCRIPTORY* having been used to designate this division, because that of *written evidence* would have comprehended testimonial evidence, when reduced to writing, as under our code of practice it always may be.

To argue the advantages of this species of evidence, to speak of its certainty and durability, would be a useless

task, when addressing the legislature of a state in which those advantages have been so wisely secured by laws directing its employment in so many instances, and under such a variety of sanctions as in this. Of writings, which may become matter of evidence, some purport to express the will of those by whom they are made, others are only declarations of facts. Of the first kind are those which are called the *acts* of the parties whose will they purport to declare. Of the second are the attestations of public officers, declaratory that certain of the acts were really made by those parties; and also, the written depositions of witnesses. With the last, the depositions, we have nothing, as has been said, to do in this division. The mode of taking them, and their effect, and the persons by whom they may be made, are pointed out in the Code of Procedure, and in the former part of this report. The other kinds of scriptory evidence, properly so called, are divided by the code into two kinds, authenticated and unauthenticated.

I. Authenticated acts are defined to be "such instruments in writing as are attested by a public officer, legally authorized for that purpose, in the form prescribed by law." It will readily be seen that the evidence here is of two kinds. The expression of the will of the party, as contained in the act, and the declaration of the attesting officer, that such writing does contain the will of the party, and to avoid any misunderstanding of the effect of such evidence, the code provides, that it shall be proof only of that which is specially attested by the officer to have been done in his presence, and nothing more, and exemplifies its intent by some of the most common cases in which this species of evidence is produced. A bill attested by the signatures of the president of the senate, of the speaker of the house of representatives, and of the governor, is an authentic act; but the signatures prove only that the bill to which they are affixed has been passed by the two houses respectively, and has been signed by the governor. The signature of the governor in his official capacity, under his seal of office, offering a

reward for apprehending a person accused of murder, is authentic evidence that such proclamation was issued on the day it bears date, that complaints were made to him of the commission of the offence, the flight of the defendant, or any other fact which he certifies to have been done in his presence ; but it is not evidence that the crime was actually committed, or that the party fled.

The code divides authentic acts into four kinds : legislative acts ; records of courts ; records of the different executive governments, made in the legal administration of its different departments, which are declared to be authentic acts ; and written instruments, made in the presence of, and attested by, such public officer as is for that purpose commissioned according to law, and purporting to testify what is said, done, or contracted by those whose acts they are.

1. A section directs the manner in which legislative acts are to be proved. In this the present law is not changed, as now the production of the original of an attested copy, or of the statutes printed by the state printer, are considered good evidence. The provision that an error in either of the kinds of copy may be alleged, and proved by collating them with the original, is also, I apprehend, the law at this time ; but it was thought advisable to insert it in terms. The mode of proof of public and of private acts, is declared to be the same. The court is directed, *ex officio*, to take notice of public acts and to carry them into effect, whether pleaded or not ; but the party relying on a private act for the support of a right, or the privilege of an exemption, must allege and prove it.

Private legislative acts are those which concern designated individuals only. All others are public acts. All acts of incorporation, made for regulating the police or local government of any part of the state ; for the establishment of the banks ; for authorizing the imposition of a toll, of tonnage, wharfage or other duty ; for the establishment of hospitals, or other purposes of charity, or the promotion of religion, education, or science, are

specially declared to be public, and all other incorporations to be private acts. But it is provided, that this enumeration is intended solely for the purposes of this title in the code, and does not affect the nature or definition of corporations established by law.

2. Judicial records are, in a section under that title, defined, and the mode of authenticating them in the several cases of their being those of a court in this state, in another state, or in a foreign country. A new provision is introduced to guard against surprise and fraud. It directs that whenever the certified copy of a foreign judgment is intended to be produced as evidence, it must be filed a specified time before the trial, and notice given to the opposing party; and if he shall object to the introduction of such copy, the party introducing it must have it collated with the original and proved, either by a witness or on commission; and that if the copy filed shall be thus proved to have been a true one, the additional expense shall be borne by the objecting party. The effect of judgments, in other states of the union, or in foreign countries, as evidence, is declared to be the same as is directed in the code, in the chapter on *Res judicata*, in relation to judgments in this state. But it is specially provided that no judgment rendered in a suit, commenced by a proceeding in rem, whether by attachment or otherwise, shall have any effect of the *res judicata*, except so far as respects the thing seized, unless the party have appeared either in person or by attorney and defended the suit.

To avoid the enormous expenses attending the introduction of proceedings in Admiralty, when necessary as evidence, it is provided, that whenever the object is to prove a condemnation in a foreign court of Admiralty, no other part of the record but the libel and the condemnation need be produced for that purpose; and that no evidence taken in such case shall be evidence between the same parties of any other fact than that in contestation in such case.

The next section provides for what is thought to be

a desideratum in our present law. It gives an enumeration of the acts of the executive government which are to have the force of authentic evidence, and the mode of their authentication. This needs no elucidation. A reference to the section itself is all that is necessary, both for its purport and for the reasons of the different provisions it contains. It may be proper, however, to remark, that while special laws provided for giving the force of authentic acts to the records of courts and notarial proceedings, the equally important documents of an executive nature were left for their authenticity to the discretion of the courts; which admitted or rejected them and gave what degree of force to them that their judgment directed, without any fixed rules, which, for the first time, are established by the proposed code.

4. Notarial acts, and the various provisions necessary to establish their validity, provide against their abuse, designate their effects, and point out the cases in which they may be declared void, are necessarily a most important subject in the Code of Evidence. Forming, as they do by our law, the principal means by which sales, contracts, donations, testaments and declaratory dispositions, in all their various forms, are to be witnessed; every provision in relation to them ought to be generally and minutely known; and for that purpose should be clearly and particularly expressed. This it has been the endeavour of the reporter to do in the three subsequent sections of this chapter.

The first of them describes the nature and prescribes the requisites of a notarial act, in which there is little to claim particular attention, as the provisions are chiefly those contained in different laws and decisions on the same subject, collected in one view, and enforced by precise enactment, which a reference to the section will fully explain without comment.

The same observation, in substance, may be made on the subject of the next section, which treats of the effect of notarial acts, in relation to those who are parties to them; and in the few cases in which they may bear upon

the rights of others, the laws and decisions on the subject are embodied and reduced to short and, it is hoped, clear precepts, which are illustrated by examples, and some new provisions are introduced which require no explanation.

"For what causes and in what manner notarial acts may be declared not authentic," is the title of the last section relating to this matter. The silence of our present law on this important topic, required the greatest care in the reduction (a) of this part of the code, and imposes the necessity of some elucidations.

The distinguishing characteristic of a notarial act, that it is authentic evidence, in other words, that it is conclusive evidence, against those who are parties to it, rendered it necessary that many formalities should be required in passing it to secure the parties, as well as the public, from imposition. These are minutely directed in a section which has already been referred to. No officer at all attentive to his duty, no party not entirely negligent of his interest, can mistake them. When they are not attended to, a presumption will naturally arise that they have been omitted for some sinister end, and the natural corrective would be punishment. This, as regards the officer, has been provided for by the Code of Crimes and Punishments, in the shape of a personal penalty. As respects the parties, the remedy is not so clear. To inflict a punishment on both would be clearly unjust. For one must be the party injured. To inflict it on either would, in many cases, have the same character. The party really consenting to the omission, may be the one injured by the neglect; while the other, naturally careless of what it was the peculiar interest of the one with whom he contracted to observe, would overlook the

(a) This word is not English, but I have ventured to employ it, from the absolute want of one to express the act of preparing for publication. It is neither entirely supplied from pre-existing materials, nor is it of original composition, but like the code I now present. If the equivalent term in the English language, it does not occur

omission of formalities, by the neglect of which he could only gain. To illustrate my meaning by an example. A sale is made before a notary, who does not call on the witnesses required by law to sign the act. The notary is justly punishable for a neglect of official duty; but a personal penalty on either the purchaser or seller, would be unjust: on the purchaser, because he is the loser by his defect of title; on the seller, because, having received his consideration, he would leave the examination of the conveyance to the purchaser, contenting himself with the perusal of the act, to see that he conveyed what he had a right to convey. As to the parties themselves, some other provision was necessary to excite their attention to the observance of forms, rendered necessary by the general policy of the law. The means for enforcing the provisions of the law, which first present themselves, are those which operate on the act itself. The contract depends on the consent alone of the parties; the means of enforcing it on the legislative will. To this there is no injustice in annexing conditions. "I will provide," says the lawgiver, "an officer who shall draw your contracts, who shall give them legal forms and put you on your guard against imposition, who shall record and preserve them, who shall furnish you with copies when you want them, which copies shall have all the force of originals; but it is on condition that the plain rules which I prescribe, to guard against fraud, error and confusion, shall be strictly observed. It is your interest as well as your duty, if your intentions are correct, to observe these rules on your parts, and to see that they are observed by those with whom you deal. If you do not, the condition is broken, and you lose the advantages you would have had by observing them. I will punish my officer when he wilfully or negligently omits to perform his duty; but unless there is evidence of fraud against you, the only penalty you incur is the loss of that character to your contract which the observance of the rules would have attached to it. Prove your contract in any other way, if it be a legal one, my laws do not affect them. I will

even allow you to consider the assent given to it by your signatures as binding; but it cannot be enforced as an authentic act." Such language seems to be appropriate to the occasion in the mouth of a just legislator, and its substance is contained in this part of the code. A notarial act, wanting any of the enumerated formalities, may be used as an instrument under private signature, if it have those of the parties; but it is not authentic.

The omission of a necessary formality, which ought to appear on the face of the instrument, is one of those facts, which the judge is empowered to ascertain by his own inspection, without other evidence. Other omissions, or defects, which would destroy the authenticity of the instrument, may be proved by other evidence, the nature of which is designated in the code.

The cases in which notarial acts may be declared not authentic, for causes not apparent on the face of the instrument, are specially enumerated. For any of which, or for any such defect appearing on the face of the instrument, as is by this section declared to destroy its force as an authentic act, it is provided, that a suit may be brought by any one interested, in which suit the objection to the act must be particularly set forth, or the party may rely on such objection as a bar to any suit commenced upon it; but in every such case, as well as where the suit is brought to have the act destroyed, the petition or answer, and the causes for considering it defective, must be specially stated. Provision is also made for the production of the instrument and giving notice of the objections to it, when it is used for some collateral point in a cause, and is not the foundation either of the suit or of the defence.

Another article specifies the cases in which authentic acts, not notarial, may be declared invalid. This, with the provision that the sentence of a court, declaring any act to be invalid, shall be noted in the margin both of the copy produced and of the original, is contained in the proposed code on this subject. It is to be observed, that in this

report, without folicitating the legislature on our finding already established a system so admirably adapted to its purpose as that of transfers by notarial acts. With the firmest conviction of its advantages over every other intended for the same ends, it would have been difficult, if not impossible, without the experience we have had, to have forced the same conviction on the people: and the maintenance of the defective system of registration, which prevails in all the other states with more or less of inconvenience attached to each, is a convincing proof of the difficulties we should have had to encounter if we had been under the necessity of removing the one of these plans to make way for the other.

II. We come now to consider scriptory evidence, of less authority than that which is declared to be authentic. This inferior evidence is of two kinds; that which is attested by the signature of the party whose act it purports to be, and is called an act under private signature; and all other written evidence not so attested.

1. The difference between authentic acts and those now under consideration, with the reason for their different weight in the scale of evidence, is explained in the code. No writing, it is said, is in itself evidence of the truth of that which it contains: it shows that certain covenants are written, and that certain names have been subscribed to them; but it contains no proof that those names were subscribed, or that those covenants were agreed to, by the parties. To give them any validity, there must be some extrinsic evidence. This evidence, in authentic acts, is supplied by the credit which the law attaches to the certificate of the public officer, and to the seal of his office, which the courts are bound, *ex officio*, to be acquainted with. But to acts under private signature no such credit is given. The production of them does not even raise a simple presumption of their validity. Proof of their execution is required. This proof, in ordinary cases, is either the testimony of a subscribing witness, or of one who knows the handwriting of the party. The code has introduced another

and more simple mode of proof, to be used at the discretion of the party. It directs that whenever a suit is brought on an instrument made under private signature, the original shall be annexed to the petition for the inspection of the party who shall be summoned to acknowledge or deny the signature. If it purport to be his own, he must answer directly to the question, under the penalty of having an evasive answer construed as a confession. If the signature do not purport to be his own, but that of some one whose engagement would bind him, and he is acquainted with the handwriting, he must answer whether he knows or believes the signature to be genuine. If he is not acquainted with the handwriting, he must say so. If acknowledged, the instrument then becomes an authentic act. But evidence may be received of any fact which would show that, from any cause, it ought not to be enforced. If not acknowledged, proof must be made as in ordinary cases. These different effects are particularly set forth in the code, as well as the circumstances under which recourse may be had to proof by comparison of hands, and the mode in which such evidence is to be received.

The perfection with which the handwriting may be imitated has led to a provision that a comparison of hands alone, unsupported by other circumstances, shall not of itself be sufficient evidence, where the handwriting is denied. The provisions of this chapter are but a development of the one which has been already sufficiently commented upon, that which requires the oath of the party in support of his defence. Few men would have the hardihood to deny their own signatures, even without oath, if it were not for the pernicious practice of throwing the defence of a suit upon the attorney, who, in the name of his client, every day, without any blame attaching either to his client or himself, asserts what they both know to be false, by denying a signature which, in a few weeks, is proved or confessed to be his. According to the plan proposed, the party

inspection, and he must, first by his answer, and afterwards, if required, openly, in the presence of his fellow-citizens and the magistracy of the country, on his own responsibility, make his declaration of the truth. Thus, independently of the gain, on the score of public justice, the members of an honourable profession are no longer made the instruments of falsehood; and, if any is asserted, the risk, the shame, and the odium is incurred and borne by those to whom it properly belongs.

Another and a very full chapter relates to copies of written instruments as evidence.

It is enacted that attested copies of authentic acts are exceptions to the rule, that transcripts are not to be received when the original can be procured. In favour of copies of other acts no such exception exists. The different kinds of copies invested with different degrees of authenticity, are pointed out, and a mode is provided for giving a certain degree of authenticity to acts under private signature, which is new and requires particular attention.

Whenever the holder of an act, under private signature, fears the loss of the instrument, or of the evidence by which he expects to substantiate it, he may, at his own expense, present a petition to a court of competent jurisdiction, praying that the party who has signed the instrument may be summoned to appear at the office of some designated notary, to witness the registry of the act.

If the party summoned answer that he denies the signature, its authenticity is tried as in common cases, and if found for the plaintiff, the registry of the act shall be decreed with costs. If he confesses the signature, or do not answer, the notary, on seeing a certified copy of the record, shall proceed to register the act by making a full copy on his records. Copies thus authenticated, are full proof of the signature, but do not entitle the party to prompt execution, as is the case with authentic acts. They are called *copies in form*, but cannot be produced without proof that the original is lost

or destroyed. On proof of loss only, security is required against the appearance of the instrument in the hands of a bona fide holder, after public notice. When destruction is proved, no such security is required.

Acts under private signature may also be authenticated and registered by the consent of the parties, testified by their signatures in the presence of the notary, so as to produce the effect of copies in form.

Even without any judicial order—and without the consent of the party signing an act under private signature, it may be transcribed in his register by the notary at the request of the holder. This is called an informal copy, and can serve only the following purposes: to become the foundation for a prescriptive right from the time of the registry, when the original is produced, but the time of its execution is in dispute, to verify that execution up to the time of its registry; after ten years' uninterrupted enjoyment under it, it has the force of an authentic act; and, connected with other circumstances, it forms presumptive proof of the execution of the original and of its contents.

The originals of acts under private signature may also be placed in deposit on the records of the notary, preceded by the declaration of the depositor, signed by the parties making the same, and attested by the notary. Attested copies of such act are authentic evidence against all who have signed the same.

A concluding section of this chapter directs the mode in which acts under private signature should be signed and attested; declares that they may be made the evidence of all kinds of obligations or declarations, except those that are specially by law declared to be made by authentic acts; and contains provisions to guard against fraud and imposition upon the illiterate.

Witnesses, when signed by the parties, may furnish evidence of the authentic kind. This species of evidence is not, however, admissible in cases which appear to require it, when the witnesses have not received the solemnities of the law.

trust, &c., and to those which from their nature were not intended to be signed ; of this kind are entries in books, family records of births, &c.

Writings of the first kind are never admitted as direct proof of the disposition of which they would have been the evidence, had they been perfected. They may be presumptive evidence—first, of the intent to make the contract or disposition, when such intent is material to the issue ; and secondly, of the truth of any enunciation in the writing, or of the knowledge which the party had of such fact. But in no case can such writing be admitted at all, unless it be in the hand-writing of the party against whom it is offered, or proved to have been made by his direction, or approved by him after it was made.

Writings of the second kind, when made by the party, by his direction, or approved by him, may also be admitted as presumptive proof of that which they enounce. But in both cases, the party may be admitted to state, on oath, the circumstances under which such writings were made, and to explain their intent.

All the kinds of scriptory evidence we have been considering, are such as were made by the parties against whom they are offered, or by their direction. Of another description are those writings, including printed papers and engravings, which are made by others. These are .

Historical works to elucidate any public fact that may become material in a litigated case.

Books of art or science—when anything appertaining to the branch of learning of which they treat is in dispute.

Maps or plans, to elucidate questions of locality ; but these are subject to restrictions contained in the code.

Accounts stated, or calculations made by persons who prove them to be correct.

Nautical or other almanacs, whenever material to the issue.

This finishes a review of the important title of Scrip-

ary Evidence—a source from which the most contradictory effects have flowed. It on the one hand gives the means of precision and permanence to testimony, those very qualities make it in many respects the instrument of fraud and imposition upon mankind. Its quantity of decision makes verbal explanation in most cases dangerous, and the rectification of error inconsistent with rules which it would be improper in general, to violate, and its permanence makes it confront the evidence, which might serve to show the causes why it ought to be declared invalid even in the few cases where such evidence would have been permitted. Its superior rank in the scale of evidence, too, makes it a stronger temptation to fraud, in the shape of forgery. These and other disadvantages should be considered, and as far as possible, counteracted by legislation. No means of effecting this desirable end appear to promise such good results as a wise system of registration: and of all those systems, none appear equal to that which is in force in this state. The provisions contained in the proposed code have been framed for the purpose of bringing it nearer to that perfection to which, by adopting the plan for gradual improvement pointed out in the beginning of this report, it is devoutly hoped it may answer.

In no other state is any other provision made to counteract a fraud, which has been practised, and will be practised, in spite of all general laws against that offence. This is the process: a deed is forged, or fraudulently altered; it is proved by a perjured, mistaken, or ignorant witness, before a magistrate—in some states, even before a magistrate residing under another jurisdiction, and therefore not amenable to its laws; this magistrate allows it to be recorded; it is transcribed on the record, and returned to the party, and by him destroyed. The copy from the record is then evidence; and the means of detection, by showing the signature to be forged from a comparison of handwriting, or other circumstances, is lost. In some states, which ought to be examined, and deserves to be imitated, the other states, no such frauds can be

committed. Publicity is secured in all cases in which the general welfare requires it; secrecy provided for, when the public interest will not suffer; permanence and security given to the originals of all important papers; and imposition upon the ignorant and illiterate prevented by the scrutinizing supervision of a public and responsible officer.

A short title of one chapter contains all that seemed necessary relating to substantive evidence.

When we reflect that from the very definition of this kind of evidence it must always be supported by testimony, to show the connexion of the object produced with the circumstances of the case; it will be evident, that it must be governed by the rules laid down in relation to that kind of evidence which serves to introduce it. A few illustrations and examples are given in the code to give a full understanding of the nature of this evidence. The mark on a tree coinciding with that stated by scriptory or testimonial evidence, in cases of disputed boundary, is substantive evidence of a landmark. The number of concentric circles in the wood that has grown over the mark, is substantive evidence of the number of years that have elapsed since it was made. Yet the mark itself is no evidence, unless supported by proof of the circumstances under which it was made.

Having considered all the divisions of evidence in relation to the source from which it proceeds, we come now to consider it in relation to the degree of weight it is calculated to have in producing that conviction in the mind, which is the object of all judicial evidence. The divisions in this view, and in the ascending scale, are, as we have seen, presumptive, direct and conclusive. But for one consideration this division would not be necessary, except for developing the nature of evidence, not for directing the mode of its admission; because, conviction of the truth, being the result of an intellectual operation, the degree in which evidence of any kind is to operate can never be prescribed; and it would, therefore, have been proper only in a theoretic view to have indicated these

divisions, but for certain positive enactment which, forming part of our civil code, it does not come within the intent of the legislature to be controlled by this code. These enactments declare what is direct, in particular cases, shall be considered as presumptive, and what others conclusive testimony. This can, in effect, be no more than directing what judgment shall be given when particular testimony is adduced; because, as has been said, no law can control the operation of the mind. Yet as the effect of the different descriptions of evidence is directed, it became necessary, in a code on that subject, to give these divisions a place. In another point of view, also, it would seem to be proper. The authority of nature, as well as that of positive law, has decreed that on a well organized mind, all events happening according to her invariable course should be considered as true; and allegations of fact, contrary to such course, as false; hence a second source to which we can refer conclusive, and in some instances presumptive, evidence. These considerations have induced the insertion of chapters corresponding to the three degrees of evidence which have been enumerated.

1. The first of these, presumptive evidence, is of two kinds, which cannot be brought under the same general definition: the one, simple presumptions, arising from the operation of the mind of the judge drawing from the existence of one fact, which has been proved, the inference that another, which has not been proved, exists also; the other, legal presumptions, are those which are made by the law itself, and which the judge is forced to adopt, whatever may be his own conclusions from the facts. Illustrations of the former are given in presumption, drawn from the structure of the human mind; such as that a man of good character will not do an unworthy act—that a mother will not abandon her child—and, from the common course of business, that if the obligation be delivered to the debtor, the debt has been paid. As examples of legal presumptions, are given the following, which are taken from the law, that he who has possessed real estate

for a year, is the owner ; and that when no time is expressed for the continuance of a predial estate, it shall be deemed to have been intended for a year. The effect of these presumptions is directed to be, that the fact presumed shall be considered as proved, unless the contrary be shown by other evidence.

Presumptions can only be raised by legal evidence ; therefore, nothing can be the legal foundation for a presumption but that which can be legally given in evidence ; and it is further provided, that simple presumptions must be founded, first, on the establishment of some fact by legal testimony ; secondly, by such deduction from that fact as is warranted by the usual propensities or passions of men—by the particular habits or passions of the individual whose act is in question—by the usual course of business, or by the ordinary operations of nature.

2. Of direct evidence, little more need be said than to give its definition, which is, that which, if true, conclusively establishes the fact in question. It, therefore, can give rise to one inquiry only—whether the fact stated be true ; and as this inquiry must be pursued in the ordinary form, the rules for conducting it must be sought under other heads.

3. Conclusive evidence forms a more comprehensive title. Every species of proof may produce conviction in the mind of the judge, and any evidence producing that conviction would, in one sense of the word, be deemed conclusive. But in this code, that term is applied exclusively to that which is declared to be such by it, or by other provisions of law which it does not alter or repeal.

It may, perhaps, seem inconsistent with the principles on which this code is founded, for the legislature so far to interfere with judicial discretion in judging of the force of evidence as to declare, that any proof shall be considered as conclusive of any litigated fact. In many cases, as has been observed, the interference is but nominal ; and the legislative phraseology would be more

But does not such a fact or such a direction to produce proof of such another fact, or to produce proof of such another fact, when such a fact would appear in evidence to the judge, then he should give judgment in the manner directed by the law, unless counter evidence was presented by the opposite party, and in case of conclusive evidence, that, whenever the designated fact should be proved, he should give judgment in the manner designated, without hearing other evidence. But in whatever manner the legislative will is expressed, - whether in the incorrect mode of directing the judge what to believe, or in the more proper manner of directing him what to decide, - is not so material as to inquire for the reasons why any such directions should be given in any form. Uniformity in judicial decisions, it will be allowed, is a very desirable object in the exercise of jurisprudence. By this is meant, the same deductions from the same facts, applied to similar circumstances. The cases in which this can be procured by legislative interference, without injustice, are few; and the probability of the reverse - that is, of different decisions, although the proof and the circumstances may be the same - is very great; because, the minds of men being differently organized, there are not many things in which all would agree. If this be the case, when not only the evidence but the circumstances of the case on which it is to operate are the same, how much more is it to be expected where these circumstances exhibit shades of difference? Yet there are cases in which, at the risk of producing particular inconvenience, the general welfare requires that this uniformity should be preserved; which can only be done by directing that, whatever may be the opinion of the judge, his decree shall be rendered in conformity with the directions of the statute, whenever evidence is, for those purposes, considered as conclusive. Without multiplying examples, it is sufficient to say that the same has been said on this subject. The

authentic act, as we have seen, is conclusive evidence of the truth of all that is certified by it to have been done in the presence of the public officer, before whom it has been passed. Different judges, from different views of the subject, might not receive an equal conviction of the truth of what is declared by it. To such it would not be conclusive evidence. There would, then, be no uniformity of decision on the validity of such instruments; but public convenience and utility require, that the holder of such an act should rely upon the faith of the officer's certificate; therefore, the law wisely declares, that it shall be conclusive testimony, although, in some instances, carelessness or ignorance may have consented to its execution, when it did not contain the stipulations that were intended. In this, however, as in all other cases where evidence is declared to be conclusive, provision is made for annulling the act whenever fraud, error or force has intervened. So the record of a judgment is conclusive evidence that the party in whose favour it was rendered, was entitled to the relief which it purports to give. Yet the judgment, in some particular case, may have been unjust, and the judge, before whom it is produced as evidence, may be convinced that it was so. But the individual interest, in this case, must be sacrificed to the stability of the general rule, it being more expedient that one unjust judgment should be carried into execution, than that all judgments should be open to contestation, whenever they were produced as evidence of the claims which they have sanctioned.

This code only refers for illustration to some enactments belonging to the Civil Code and other general laws, by which certain evidence is declared conclusive. It does not detail them, but it enforces their provisions; shows that the objects they are intended to attain are to diminish litigation and lessen the temptations to perjury; and divides them into positive enactments for the purposes just mentioned, and those which are declaratory of the usual course of nature. Examples of the first are

afforded in the authority given to judgment—to authenticate acts, and to judicial confessions—and of the fact in the provision of our existing law, that the birth of a child more than three hundred days after the death of the husband, is conclusive proof that the child is not his.

In the enumeration of evidence, declared to be conclusive, the item of judicial depositions is the most important, both for the frequency of its occurrence, and the difficult questions to which it gives rise. A whole chapter is devoted to this subject. It contains few provisions entirely new; but, it is believed, that the several sections, directing what judgments are valid as to judgments—which cannot have that effect, and against whom they may be given in evidence, will obviate many of the difficulties that have hitherto attended this subject; and that, if adopted, a ready solution will be found to most of the questions to which it has given rise.

Another species of evidence which under certain circumstances, is conclusive, arises from the confession of the party. Confession, in relation to the manner in which it is made, is either judicial or extra-judicial. The former, being that which is made in some writing forming a part of the judicial proceedings in a cause, or when it is made before a person authorized by law to receive the same, and reduced to writing in the manner prescribed by law. The latter are confessions made in any other manner.

In relation to the matter, confessions are either full, or partial only. Full confession is that which acknowledges the fact alleged with all its material circumstances, so as to leave nothing to be supplied by other evidence. Partial confession, is that which acknowledges some circumstance from which an inference may be drawn, so as to make it presumptive evidence.

In civil cases, where every proceeding made by the parties is in writing, and after full deliberation, a judicial confession is declared to be conclusive evidence, if made in writing, and after a reasonable time for deliberation, and the satisfaction of the judge to be erroneous;

but restrictions are added, to prevent vexation by making and capriciously retracting confessions.

In criminal cases, however, no confession, whether judicial or extra-judicial, is conclusive testimony of guilt. The reason of this difference is evident. Insanity, promises, fear, hope of liberty or pardon, may produce a confession contrary to the fact; and therefore, although the confession is strong evidence, it is always open to be rebutted by any other that would lessen its force.

Even the answer of "*guilty*" to the arraignment is not a sufficient ground for passing sentence, until the necessary inquiries as to the sanity of mind in the prisoner and the existence of the other causes have been made. When we reflect on the numerous instances in which men have confessed themselves guilty, not only of crimes which they had not committed, but which were impossible to be committed by any one, the necessity of these precautions will be admitted. The inexplicable state of mind which produced, in so many instances, confessions of sorcery and witchcraft, may take place in other cases, although those delusions are over.

By the declaration, that no evidence should be deemed conclusive but that which is declared to be such by law, that which operates as such by our present law under the title of estoppel, is of course abolished; but for greater certainty, that effect is declared by a special provision.

A concluding article contains the necessary notice that nothing in the code shall be construed so as to dispense with the proof required by the Civil Code or other statutes, to give effect to certain contracts or testamentary dispositions, or to enforce the registry or recording of acts, or prove legitimacy, filiation or civil condition. A detail of the evidence, required in these and similar cases, did not form a part of this code, because they could not have been inserted without repeating the provisions of the laws of which they form a part, which would have intermixed two distinct branches of legislation, required by the policy of our law to be kept separate.

Before I close the report, it may be necessary to ac-

count for an omission in the work—that of not designating the evidence required or permitted in each separate species of civil action and criminal procedure. It is easy, however, to show that this would have been unnecessary and injurious to the simplicity of the plan that has been adopted.

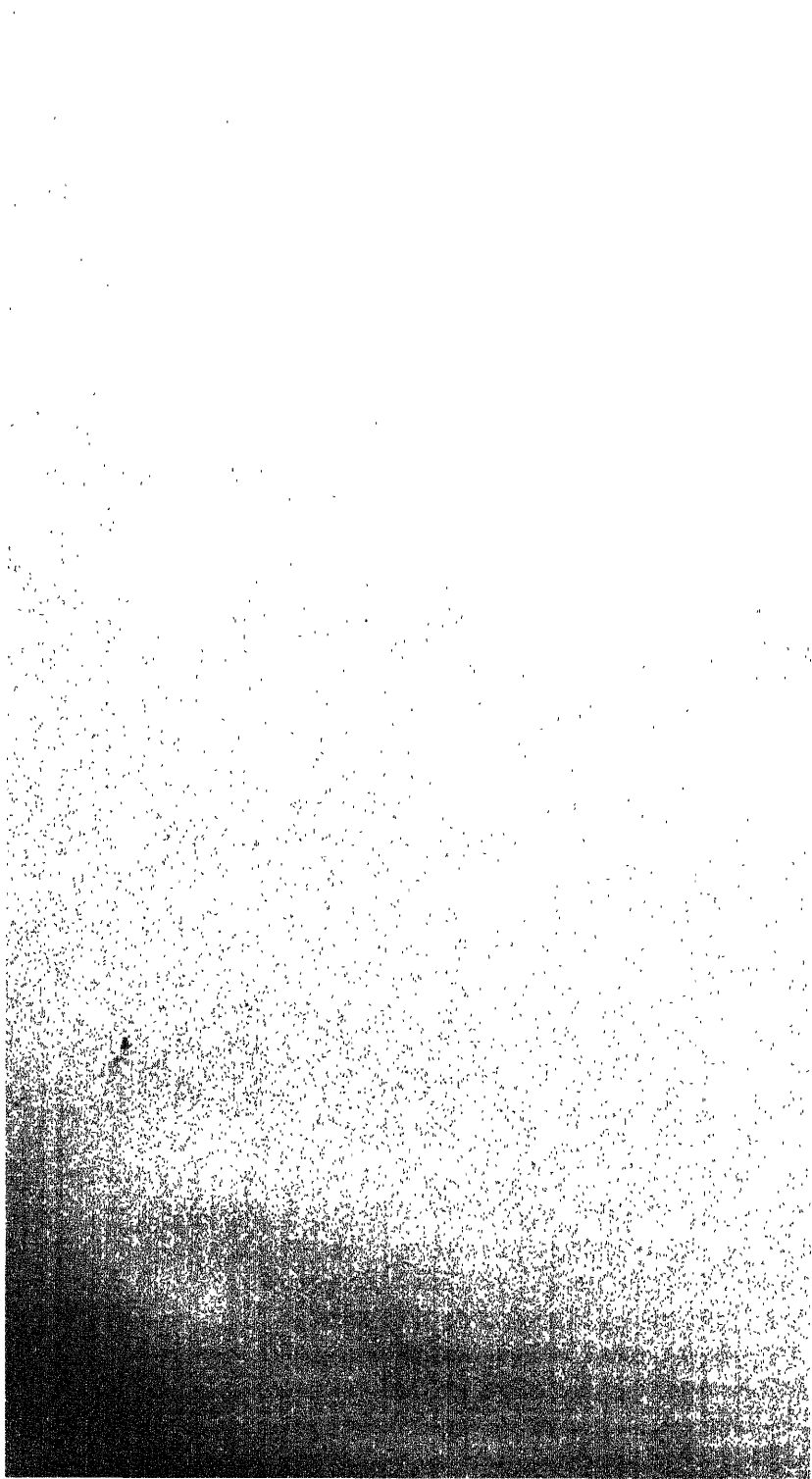
By our excellent system of civil law, a plaintiff can succeed only by stating such facts as entitle him to relief according to law; and by proving those facts. In these two operations he must be directed by two different codes. The Civil Code informs him what circumstances give him the right to recover; and it is the province of the Code of Evidence to direct in what manner the proof shall be made; not of the facts in that suit only, but of all facts in any action. To direct what facts are necessary to be proved, in order to be restored to a possession which is wrongfully withheld, to enforce the payment of a debt, or obtain damages for a wrong—could only be done by repeating the substance of the Civil Code, and would, therefore, be misplaced in the law of evidence, which ought to contain only general rules, applicable to the different species of evidence, not to particular actions in which that evidence may become proper or necessary. It is the same as regards the defence: the Civil Code directs what circumstances will justify an act that would otherwise be wrongful: and the Code of Evidence tells us, by the application of its general rules, how those circumstances are to be proved. So in criminal prosecutions; the acts or omissions which constitute an offence, are designated in the Code of Crimes and Punishment, and consequently we need no other guide to discover what is necessary to be proved in any particular prosecution. Why, then, should it be repeated in the Code of Evidence?

A contradictory practice on this point, together with the necessity of arranging and weighing the authority of the contradictory or explanatory decisions, in every controversial case, has rendered the English law of evidence extremely voluminous, and contributed to increase its

INTRODUCTORY REPORT

TO THE

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IN offering to the legislature a system of penal law, the principal sanction of which is imprisonment, it is scarcely necessary to remark, that its whole efficacy must depend on the manner in which confinement is to be inflicted as a punishment, or used as a means of detention ; in other words, on the wisdom of the Code of Prison Discipline. In preparing the plan now submitted, I kept in view, as the great objects to be attained—restraint, example and reformation. To discover what species of seclusion would best produce these ends, rigidly to direct every privation necessary to attain them, but to inflict no evil greater than was required to produce these consequences, would seem at first view a comparatively easy task ; but the selection of proper means, and the details required for their application, presented difficulties in the execution only to be overcome by the closest attention to facts, and the most cautious calculation of consequences. A statement of these facts, and an exposition of the consequences drawn from them, will enable the House better to understand and decide on the plan which I have the honour to propose.

At a time when the penal law of Great Britain, still liable to the reproach of unnecessary severity in its enactments, and barbarity in its executions, had received none of those improvements which the true principles of jurisprudence have since produced, the benevolent heart and

enlightened mind of the Legislature of Pennsylvania suggested the substitution of solitary imprisonment and labour for the punishment of death. The beneficial effects of this change were felt until they were counteracted by the intolerant and sanguinary system of the common law of England, enforced by the paramount authority of the mother country. But no sooner did independence confer the power of consulting the public good, than the people of Pennsylvania made the reformation of the penal code a constitutional obligation on their representatives; and amidst the confusion produced by foreign invasion and civil discord in the revolutionary war, a society worthy of the city of "brotherly love" was formed for the relief of distressed prisoners. With persevering benevolence, they not only relieved the victims of the inhuman system that then prevailed, but, by unceasing appeals to true principles, induced the legislature of that state to begin the great reform. In all but two or three cases, the punishment of death was abolished: labour was substituted for loss of life and stripes; but contrary to the opinion early expressed by the society in favour of solitary labour, that on the public works was adopted. The error was a radical one: debasement, corruption, and an immediate repetition of crime, were the consequences; and the failure of this experiment with any but a wise and reflecting people, might have been fatal to the system. But, happily for Pennsylvania, and perhaps for the world, she had enlightened men to frame her penal laws; and happier still, she had a class of citizens admirably calculated to execute them with the zeal of enthusiasm. The founder of that state, and his first associates, belonged to a sect which fitted them, by its principles, and by the habits and pursuits which it created and prescribed, to be the agents of a reform in jurisprudence similar to that which they adopted; and perhaps carried to excess, in religion. Their descendants, with less of that enthusiasm than their ancestors were excited by persecution, had the same benevolent and Christian charity necessary to the success of the cause, and the same industry to

support their exertions. Abstracted by their tenets from the pleasures which occupy so large a portion of life among other sects ; equally excluded from other pursuits in which so many find occupation ; freed from the vexations of mutual litigation by submitting every difference to the umpirage of the elders, and from the tyranny of fashion by an independent contempt for its rules, the modern quakers devote all that time which others waste in dissipation, or employ in intriguing for public employment, to the direction of charitable institutions, and that surplus wealth which others dissipate in frivolous pursuits, to the cause of humanity. In every society for promoting education, for instructing or supporting the poor, for relieving the distresses of prisoners, for suppressing vice and immorality, they are active and zealous members ; and they indemnify themselves for the loss of the honours and pleasures of the world by the highest of all honours, the purest of all pleasures—that of doing good.

To these men, and others who participated in their principles, was committed the task of uniting reformation and punishment, when seclusion was substituted for the public labour to which the convicts had before been exposed. The most encouraging results justified the change in the law, and the selection of persons to whom its execution was committed ; and from the year 1790, when it took place, until 1793, we have the official attestation of one of the inspectors (*a*), that out of 200 convicts who had been pardoned, only four were returned on a second conviction ; that only two cases of burglary, and not one of privately stealing from the person, had occurred ; that the streets and roads were freed from robbers, and that in all the prisons for the populous city and county of Philadelphia, immediately before the sitting of the court, only four persons were in custody for trial. This last is a striking fact. The city and county of Philadelphia, at

(*a*) A member of the Society of Friends, who has rendered the name of *Lowndes* as celebrated for active, enlightened benevolence, as a late lamented statesman has since done for eloquence, patriotism and integrity

the first calendar of 1786, 1787, 1788, and 1789, that, of the 111 crimes that had been committed at that time, 100 were disposed of in the space of two years, the effect being a total suppression of some crimes, and the reduction of others in the proportion of ten to one, in the place where the example might be supposed to have had the greatest effect. The operation of the system in the whole of the state was nearly as encouraging. Although the population was increasing in a very rapid ratio, yet conviction decreased from one hundred and twenty five, in the year 1789, to the respective numbers, of one hundred and nine, seventy, sixty three, forty five (a), in the four succeeding years. Thus we find that, although the population of the state was increasing in a ratio of four and a half per cent. a year, offences (b) had decreased in the proportion of forty-five to one hundred and twenty five, or nearly two-thirds less; and in the last year I have mentioned, there were no convictions for one-half of the crimes that had figured on the preceding calendars. So remarkable a diminution of crime in a regular decreasing series, is a fact worthy our most profound attention, when we are considering the effects of this species of punishment. Nothing can develop the true principles of legislation on this subject more clearly than the history of the reform in Pennsylvania in all its stages. In 1786, we find that the various system of labour in the public works was established. Under it, in the three years of its operation, and the first year after its repeal, but before the effects of the system could cease, the average number of convictions in each year was one hundred and nine; in 1791 it decreased under the new system to seventy-six; in 1792 to sixty-three; and in 1793 to forty-five: all this while the population of the state and, what is more worthy to be noticed, of the city, was rapidly increasing. This was the first point of depression, from that time the increase

has been in a more rapid ratio than the diminution : for the first four years afterwards, the average was one hundred and nineteen, and it has gradually progressed until the average of the last twelve years is three hundred and eleven ; that is, within a fraction of eight times as many as it was in 1793 ; but the population of the state in that time had very little more than doubled (*a*), so that crime has increased in proportion to the population nearly as eight is to two. Most fortunately for the cause of truth, humanity and wise legislation, the cause of this ebb and flow of crime is not difficult to discover ; and when pointed out, it will be more persuasive to show that there is a check that may be effectually applied to the increase of offences than the most ingenious argument that could be suggested.

In the three years previous to the year 1790, when Philadelphia prison was first used for the purpose of inflicting punishment by solitary confinement, three hundred and twenty-eight convicts had been confined. Of these, about two-thirds were committed for short terms, and others were discharged by pardon ; so that at the commencement of the year 1790, not more than about two hundred remained. The accommodations of the prison afforded the means of separation for this small number, and the humane zeal of the inspectors, quickened by the natural desire to give efficacy to the plan which they had themselves formed, urged on the labour and superintended the instruction of the convicts. In that year, the first of the experiment, but before its result could be known, one hundred and nine convictions took place. In the next, its beneficent effects began to be felt ; the convictions were reduced to seventy-eight, and in the two successive years to sixty-three and forty-five. But in the meantime (*b*) the prison began to be crowded,

(*a*) Four hundred and ninety-five thousand one hundred and eighty-five, in 1793 One million forty-nine thousand four hundred and fifty-eight, in 1820.

(*b*) No provision had been made for the increased number of prisoners, which of all descriptions amounted, in 1793, to the average number of 450

solitary labour was not only abundant, even classification became superfluous. In the prison existing for vagrants, fugitive negroes, and those committed for trial, and even for idlers, was the natural consequence of the indeterminate association, and the increase of conviction, in every succeeding term of four years, bears an exact proportion to the increased numbers in the prison. This double result of a rapid and before unheard of decrease while the convicts were separated and employed, and an increase almost in the same ratio when they were suffered to associate, seems to solve the great problem of penal jurisprudence, and points to seclusion and labour as an effectual remedy for the prevention of crime—for these effects were produced without any change in the state of society at the two periods, that could be favourable to such results; on the contrary, an increase of population while crimes were decreasing, and the same increase, but only of one half, in the numbers of the people during the other period, when crimes increased fourfold. This practical result, so decisive of the truth of the theory, founded on a consideration of human nature, with other corroborating facts, has confirmed me in the design, not only of persevering in my first recommendation of imprisonment, solitude and labour, in different degrees, and under different modifications, as the principal sanctions of the code, but it has become the basis of my whole system of prison discipline; and from the well attested fact that a plan, by no means perfect, persevered in for only four years, banished some crimes, and rapidly reduced the number of others nearly two-thirds, I draw the cheering conclusion, that, by giving to the system the improvements of which it is susceptible, the sum of human happiness may be increased by the repression of crimes and of the evils which result both from their commission and from their punishment.

It is, therefore, my recommendation, with seclusion and

labour, as a punishment, will diminish the offences for which it is inflicted; but that imprisonment without seclusion will increase them. What will be the effect of solitary confinement without labour, remains to be tried. The Pennsylvania experiment proves conclusively, that while the numbers were not too great to admit of seclusion, offences diminished; and when it was no longer practicable, they increased. In all the other states a similar result has been observed, during the first years. When there was room for classification, the most sanguine hopes of humanity were surpassed by the effect (*a*). But with the promiscuous intercourse of the convicts, offences increased both in number and atrocity. This great truth, then, is supported in both its parts by experiment, the most conclusive of all proof, when it has been so often repeated, under different circumstances, as to show the uniform result is produced by the same cause, and when it confirms a theory to which no abstract objection can be conclusively urged. But here the theory is emphatically one of that kind. Of all the crimes in the catalogue of human depravity, four-fifths are, in different forms, invasions of private property and the motive for committing them is the desire of obtaining, without labour, the enjoyments which property brings. The natural corrective is to deprive the offender of the gratifications he expects, and to convince him that they can be acquired by the exertions of industry. The remaining portion of offences are such as arise from the indulgence of the bad passions, and for those also solitude and employment are the best correctives. But whatever corrects the desire or the passion that prompts the offence, acts in the double capacity, first of punishment, until the desire is repressed, and, afterwards, when it is effected, of reformation. As an example, too, it is infinitely more efficacious than any other penalty. When it is seen that offences which were committed to avoid labour and to increase the enjoyments of society,

(*a*) See reports to the Senate of New York, and the reports of all the state prisons in the different states.

ad only to solitary confinement, and that the prison which caused the most serious evils, and to be kept under the rigid restraint of solitary confinement, in the fearful banishment of evil counsel and example, are permanent, and by a rigid administration of justice believed to be inevitable, who then could human nature can doubt the effect? There are the experiments of Pennsylvania and of the other states, in the first years of their operation, as well as their subsequent failure, have but confirmed a theory true, because it was drawn from the workings of the human mind. They succeeded at first exactly in the proportion to the strictness of the seclusion; they failed precisely in the ratio of its relaxation.

Solitude and labour, then, are the two great remedies. How are they to be employed? Is the confinement to be a rigid, unbroken solitude, or only a seclusion from the corruption of evil counsel and example? Is it to be permanent for the whole term of the sentence, or to be mitigated by proofs of industry and amendment? Is the labour to be forced or voluntary, and is its principal object pecuniary profit to the state, or the means of honest support to the convict? These are the great questions to be decided before we enter on the consideration of a multitude of subordinate details.

When imprisonment and labour were substituted for corporal punishment, the evils of promiscuous association became apparent. The separation most obviously required was that of the sexes, and this seems to have been universally introduced. But it required little observation or knowledge of human nature to discover that something more was necessary; that, as a place of punishment, a penitentiary would soon lose its terrors, if the depraved inmates were allowed to enjoy the society within, and were not more severely punished when at large; and that, if the place of confinement must become the place of instruction, it must become the place of instruction in the most efficient manner, and the professors of the most efficient system.

comparatively ignorant. To remedy this evil, what is called classification was resorted to ; first, the young were separated from the old, then the analogous division was made between the novice and the practised offender ; further subdivisions were found indispensable, in proportion as it was discovered that in each of these classes would be found individuals of different degrees of depravity, and, of course, corruptors, and those ready to receive their lessons. Accordingly, classes were multiplied, until, in some prisons in England, we find them amounting to fifteen or more. But, all this while, the evident truths seemed not to have had proper force. first, that moral guilt cannot always be discovered, and if discovered, so nicely appreciated as to assign to each one infected with it, his comparative place in the scale ; and that if it could be so discovered, it would be found that no two would be found contaminated in the same degree. Secondly, that if these difficulties could be surmounted, and a class could be formed of individuals who had advanced exactly to the same point, not only of offence, but of moral depravity, still their association would produce a further progress in both, just as sparks produce a flame when brought together, which separated, would be extinguished and die. It is not in human nature for the mind to be stationary ; it must progress in virtue or in vice : nothing promotes this progress so much as the emulation created by society ; and from the nature of the society will it receive its direction. Every association of convicts, then, that can be formed, will in a greater or less degree pervert, but will never reform, those of which it is composed : and we are brought to the irresistible conclusion that, classification once admitted to be useful, it is so in an inverse proportion to the numbers of which each class is composed ; and is not perfect until we come to the point at which it loses its name and nature, in the complete separation of individuals. We come, then, to the conclusion that each convict is to be separated from his fellows. But is he to be debarred from all other society ? In discussing this question we must always

ave before our eyes the ends we propose to attain by the discipline we inflict—punishment and reformation. So much punishment as is necessary to deter others from committing the crime, and the offender from repeating it; every alleviation not inconsistent with those objects, that will cause the culprit gradually to prefer a life of honest industry, not from the fear of punishment, but from a conviction of its utility. That system of prison discipline will make the nearest approach to perfection that shall best attain these objects. In order to judge in what degree the plan I propose is entitled to its distinction, it will be necessary to examine other systems, and a discussion of their defects will enable us to discover how far that which is proposed as a substitute avoids them.

Imprisonment and labour have been adopted, as a punishment, in fourteen out of twenty-four states. In none of these has there been, until very lately, any individual seclusion, except for breaches of prison discipline, and, during different periods, for the more atrocious offences: the consequences of this radical fault were such as might have been expected—an increase rather than a diminution of crime; and the prodigal, indiscreet and ruinous exercise of the pardoning power, combined to render abortive the best experiment ever made for the suppression of vice. The people who were taxed for the support of these institutions, saw in them only the nurseries of crime, and were naturally desirous of throwing off the burthen; and it was made, in one important state, a serious question whether they should not resort to sanguinary and infamous punishments. The calm reasoning and spirit of investigation which sooner or later resume their place in the councils of our republic, soon discovered that the experiment had not been fairly tried; the conduct of the authorities was impotent; and all agreed that a more judicious and more judiciously regulated system would never be devised. The different systems of punishment are now under consideration, and one is in the

it into effect on a most extensive scale, and in a degree that must completely test its utility. In New York there are two penitentiaries, and a third is now constructing: one of them, in the city, is, from its construction, and the numbers confined in it, necessarily conducted on the old vicious plan, which is to be abandoned as soon as the third prison is finished; the other, at Auburn, a village in the interior of the state, is the model for the new penitentiary, and by the partisans of the system on which it is managed is declared to be one that ought to serve as a pattern for all others. That system is briefly this: absolute solitude during the night; joint labour during the day, but without any communication with each other by word or sign; meals taken at the same table, but so disposed as not to see the faces of those opposite to them; religious instruction on Sundays, received in a body; and a Sunday school in the same manner, twice a day; both in church and school the same prohibition of intercourse; a full diet of meat, bread and vegetables; comfortable bedding, in very narrow, but well aired, well warmed cells, and the utmost attention to cleanliness in every department of the prison; visitors are admitted, but without permission to speak to the convicts, who, on their discharge, receive a sum not exceeding three dollars, without any relation to their earnings; their work is uninterrupted during the day, except by their meals, and is generally contracted for by mechanics, who find the materials. This enumeration is not one of what is required, but what is actually done. And the strictness with which these rules have been enforced is such, that it is asserted that among thirty or forty working together for years in the same shop, no two of them know each others' names. Mr. Elam Lynds, a gentleman who formerly served in the army, has the credit of introducing this order: it was begun with his appointment as keeper of the Auburn prison, and he has executed it with most astonishing success in superintending the building of the new prison at Sing Sing, where he has had two hundred convicts

what? Lawful commands, is the answer; but it is unlawful to break any, the minutest regulation of the prison; it is unlawful to deny any breach of them when the convict is accused by the turnkey; therefore, if a convict speak to his neighbour he is whipped, and if he should deny having done so he is whipped. The very case in which the stripes were declared lawful, was one in which they were severely inflicted to make the convict confess, and when he had confessed, they ceased. Here is every character of the torture applied by the lowest officer in the prison; and this by the court of the state of New York was declared to be lawful, if the jury should think that the chastisement was not greater in degree than was necessary to enforce obedience. Now, the obedience required in this case was the confession; and it follows, according to the decision of the court, that such force as was necessary to this end was justifiable: in other words, that torture by infliction of stripes might legally be used in the state of New York, by a turnkey against a convict, according to the *common law*, although the legislature has enacted, "That if any prisoner in either of the state's prisons shall refuse to comply with the rules, it shall be lawful, and is declared to be the duty of the keepers, under the direction of the inspectors, to inflict corporal punishment by whipping, not to exceed thirty-nine lashes, or to confine them. Provided that, when corporal punishment is inflicted on any person by whipping, it shall be the duty of at least two of the inspectors to be present." Then, according to the discipline of the prison, as declared by the court to be lawful, only thirty-nine stripes can be inflicted at a time for any offence, and that by order of the inspectors, and in the presence of two of them; but a turnkey, whenever it is necessary to enforce obedience, or a confession, may inflict as many as he pleases, without any witness of his proceedings. I have enlarged upon this head more, perhaps, than was necessary, to enforce the position that the punishment by stripes was an anomaly even as it is permitted by law; and I have detailed the practice inde-

pendent of the statute, for the direct purpose of showing the principle on which the discipline of this prison rests; and for the accidental one of illustrating, by a striking example, the difficulty of enforcing a code in countries governed by unwritten law. Here, because the common law permits a schoolmaster to order a boy to correct his pupil, and an officer his soldiers, the learned judge declares it to be law that the turnkey of a penitentiary, an institution utterly unknown to the common law, has a right to chastise a convict, nay, more, whip him until he confess himself guilty of an offence; and thus, too, although the legislature has expressly directed that when he is whipped it shall be by the direction of other officers, and in their presence. Yet this decision is law in the state of New York, and is published as the authority by which the discipline of this prison is maintained.

The next objection to this system is its evident liability to abuse. The talent and firmness, tempered by moderation, the knowledge of human nature, and personal courage of Captain Lynds, who introduced it, and who began by procuring a waiver of all interference with his plans by the inspectors, have done much present good; he has introduced order, economy, industry and cleanliness; he has banished many abuses; and his system, under his own direction, although liable to strong objections, is yet so much superior in effect to any hitherto practised, that it has been considered as a model (a) for the imitation of the world; and in his hands, I have no doubt, that many beneficial effects will result from it. But what security have we that the same rare qualities will be found united in another? In the communications I have had with him, he says, that his method may be easily taught. This may be true, but unless he can impart his integrity and moderation (b) as well as a know-

ing the Massachusetts State Prison, where I have attended to take place, I believe, after the most careful observation, and is itself a strong illustration

ledge of his discipline, it will be unsafe to adopt a system that must depend entirely for its success on the personal qualities of the man who is to carry it into effect.

But, even if we were sure of commanding all the requisite qualities and talents united in the same person, still there are faults, inherent in the plan, which no administration can cure. Fear is the great principle of this institution, and chastisement of the most degrading kind is the instrument to excite it. If the sole objects were to preserve order in the prison, it is perhaps as effectual, but certainly not as proper a mode as can be devised. But, as a punishment, it fails in two essential points; in most cases it will not deter the party from a repetition of his crimes, and very rarely will it take away by reformation his inclination to relapse. A superficial view of this subject has led to the belief, that the great secret of penal legislation is, to annex a penalty of sufficient severity to every offence; and, accordingly, all the variety of pains that the body of man could suffer, infamy and death, have figured as sanctions in the codes of all nations; but although these have been in a train of experiment for thousands of years, under every variety that government, manners and religion could give, they have never produced the expected effect. The reason is to be found in that insurgent spirit with which man was endowed by his beneficent Creator, to answer the best ends of his nature. The same feeling that elevated, refined, and applied to the noblest purpose, animates the patriot to resist civil tyranny, and the martyr to defy the flames, when it is perverted, and made the incentive to vice and crime, goads on the convict to arraign the justice of his sentence, to rebel against those who execute it, and to counteract its effects with an obstinacy in exact proportion to the severity of the punishment. If the grossest follies and absurdest fancies of enthusiasm, as well as the clear truths and pure principles of religion, are extended and confirmed by severe punishments and persecution, what more evident proof can we require, that this character of the human mind braces itself with an equal energy against

be found in which any series of constrained acts, have produced the habit of continuing them after the force was removed; but this part of the subject will be more fully discussed, when I shall explain the reformatory system contained in the code which I submit for consideration. I will only now remark that, so far as the force is applied to coerce the convict into a knowledge of some trade, by which he may earn a subsistence; so far it may produce amendment; but then if the same labour can be made a voluntary act, the skill attained in it will probably be more perfect, and undoubtedly there is a greater chance of its being persevered in.

I conclude, then, that this system, although it avoids the obvious defect of promiscuous confinement at night, and, by the strictness of its discipline, prevents many of the evils attending associated labours by day, still has defects, that will not permit me to agree with the committee of the Massachusetts Society, in considering it as a model for imitation. Before I develop the features of one, in which I think these defects are remedied, while all its advantages are retained, it will be necessary to examine the rival plan proposed in Pennsylvania. This consists in solitary confinement, strictly so called, by which, say the committee who proposed it, we mean "such an entire seclusion of convicts from society, and from one another, as that, during the period of their confinement, no one shall see or hear, or be seen or heard, by any human being, except the jailor, the inspectors, or such other persons as, for highly urgent reasons, may be permitted to enter the walls of the prison" (a). To carry this plan into execution a prison has been erected at Pittsburgh, and another is nearly completed on a most extensive scale, at Philadelphia. This last is most admirably contrived for perfect seclusion. The purposes of cleanliness do not demand the entrance of an attendant, or the egress of the prisoner. His food is furnished without his seeing the hand that

brings it ; and a complete inspection of every part of the cell is had, while the prisoner can neither see nor hear the approach of his keeper : all is silence and solitude, and, if these alone can work reformation, there was never a building better calculated to produce the effect. Whether labour is to be permitted or enjoined does not seem to be determined. There is a court, however, annexed to each cell, in which solitary labour may be performed without much danger of communication between the prisoners. This system is simple, and has few details beyond those I have mentioned in describing it. The advantages expected from it are described in the report to which I have referred. Reformation, it is hoped, will be produced by the reflections inseparable from solitude, and the severity of the punishment is well described in the report, as one that will almost make the patient "*the victim of despair*," while he is "shut up in a cell for weeks and months and years alone, to be deprived of all converse - while he counts the tedious hours as they pass, a prey to the corroding of conscience and the pangs of guilt : " and this, it is supposed, will effectually deter the convict from repeating his crime, and make the vicious fly from a region "*where conviction produces so much misery*." As the severity of the punishment is increased, its duration is proposed to be diminished ; which will produce a saving that the committee believe will compensate for the loss incurred by the difference between solitary and social labour, if the former should be allowed. It is evident that here the contagion of evil associations is effectually prevented without the degrading discipline of the New York plan ; that the security is more perfect, and at less expense ; and, if they should make such relaxation from the strictness of solitude as to permit instruction and labour, that it is liable to much fewer objections than the other. If, on the contrary, the plan of the committee, in their understanding what is meant by solitude, be carried strictly into effect, without instruction, without labour, those who are shut up in such a cell, will be in a state of total ignorance. Their

force will be better understood when I show in what points the plan I propose differs from those I have thus reviewed.

I premise that no plan of jurisprudence, combining the prevention of crime with the reformation of the criminal, has ever yet been attempted on such a scale as would embrace all the different stages and departments of criminal procedure. The only experiment that has been made, that which is called the penitentiary system, has been applied solely to the substitution of imprisonment for other more acute bodily suffering as a punishment after conviction, in the expectation that it would not only deter but reform ; and the results, during the first years of the trial, gave encouraging proof that, if conducted on proper principles, it must have the most beneficial effect. But the wretched economy that refused the accommodations for separate confinement ; the exercise of the pardoning power, ill-advised in many instances, in others resulting from a necessity created by that economy ; and the neglect of moral instruction, co-operated to arrest the course of this first great improvement ; and all the different state committees unite with that of Pennsylvania in the declaration, that the great penitentiary system is no longer in operation. But this, even if it had been fully tried, is but one part, though an important one, of a reformatory code that deserves the name. To be perfect in its object, such a system should begin by proscribing a plan of public education, not confined to the elements of literature, but extended particularly to the duties of a citizen towards the state, and of men towards each other in every relation in life, and to those principles of religion which are equally acknowledged by all sects. It would only be repeating trite maxims and acknowledged truths, were the necessity of an early education to be enlarged upon ; but it is its operation, when extended to all classes of society, in preventing offences, that is here considered ; early youth is the season in which the germs of cupidity are to be eradicated.

Enrolled copyists.

Prints at the University of London.

Monks' superintendence.

Parliamentary business.

It is there our legislation on this subject must begin, if we wish that its foundation should be stable. A prejudice has been entertained against religious instruction in public institutions, from a fear of their being made the engines of proselytism to sectarian doctrines—a fear well founded in countries where there is a dominant sect, but utterly groundless here, where the only establishment is that of perfect equality, and where there would be no practical difficulty in leaving to the parents and pastors of every pupil the care of instructing him in the particular dogmas of his church, at the same time that the principles in which all concurred might be inculcated in the public school, not only as duties of morality but of religion. It is astonishing how little use has been made of this powerful, I might say, when properly used, this omnipotent engine, in promoting the temporal concerns of society, as well as the most important welfare of the individuals who compose it. When it has been called into action, it has been either in aid of temporal, often absolute power, or for the aggrandizement of a particular church. In our happy country no such result need be feared; and if this important part of a system for diminishing offences was within the compass of my undertaking, I should offer the project of a statute on this subject, that I think would secure the most perfect equality of religious rights, while it added the inestimable advantages of religious sanction in the prevention of crime. These advantages cannot be placed in a stronger point of light than is done by a gentleman to whose publications on this subject I have been indebted for much information, in fact, as well as instruction in argument. "It is," he says, "the infliction of punishment which is as certain as the promulgation of the law, and which should be promoted by the state. But as it is not the duty of the state to enforce the law, it is not the duty of the state to enforce the law."

system of laws as can detect and punish all offences, the daring criminal perceives the imperfection, and, trusting to his own precautions, and availing himself of time and circumstances, flatters himself with the prospect of impunity. Not so with the denunciations of divine punishment; which, when duly impressed on the mind, possess a sanction at which mere human authority can never arrive, and bring with them the *certainty of detection* and certainty of punishment, which alone can, in *all cases* and under *all circumstances*, prevent the perpetration of crime. If, then, we are once able to produce upon the mind a thorough conviction of the existence of one supreme, intelligent, superintending being, the creator of all things, who sees through all his works, and perceives the deepest recesses of the human heart, and who *will reward or punish every one according to his deeds*, this will not only remedy the defects in mere human institutions by providing that continual inspection, discovery, and punishment, which such institutions endeavour in vain to supply; but will correct innumerable offences of every kind which they do not pretend to punish, and which are wholly beyond their reach" (a). Such a plan of general religious instruction, embracing the doctrines common to all the Christian sects, and excluding all sectarian doctrine, is not mere theory. It has been for years practised in the city of Boston, where nearly 100,000 dollars are appropriated to the public instruction of children of every denomination, and where the forms of religious instruction have been settled by the pastors of the several sects on the principles I have laid down; and such success has attended this honourable and liberal experiment that, although the schools have been in operation for more than ten years, and on an average more than three thousand have been educated in them annually, not one of those educated there have been even *committed* for a crime (b). And in New

(a) Roscoe. Additional Observations on Penal Jurisprudence.

(b) As far as the reporter is informed, the United States have given the first example, in modern times, of provision for education, furnished

York a similar effect has been observed. Of the thousands educated in the public schools of that city, taken generally from the poorest classes of society, but one, it is asserted, has ever been convicted, and that for a trifling offence (*a*).

I should apologize for drawing the attention of the legislature to a subject that might seem foreign to the plan which this report is intended to elucidate, if public education were not found to be one of the best means of preventing crimes, and if the reflections here made did not apply to the instruction which forms so large a part of the prison discipline which I propose. Adverting, then, only to this as to a subject connected with, but not embraced by, the matter of this report, I proceed to develop the system which, after the maturest reflection, I have submitted for consideration. Its objects are extensive and many, but are so closely connected, that to strike out any one would destroy the unity that must give it effect. Instead of confining it, as has been hitherto done, to considering imprisonment and labour as the means of punishing crimes already committed, I draw the attention of the legislature to the means of preventing them, by provisions bearing upon pauperism, mendicity, idleness, and vagrancy, the great sources of those offences which send the greatest numbers to our prisons.

Political society owes perfect protection to all its members in their persons, reputations and property; and it also owes necessary subsistence to those who

at the public expense to all the community. The early colonists of New England set the example; the system is coeval with the first settlement of Massachusetts, and has with the most enlightened spirit of legislation been adopted by other states. The liberal arrangement with respect to religious instruction is not confined to the period of ten years mentioned in the text—it was made much earlier; but the fact of its operation in preventing crime was derived from a gentleman (S. L. Knapp, Esq.) who was long a resident in the state, and acquired during that period, by a personal attendance at the schools, and a close professional attendance in the courts.

It was from Thomas Hady, of the commission, 1822, containing a report on the subject,

cannot procure it for themselves. Penal laws to suppress offences are the consequences of the first obligation, those for the relief of pauperism of the second ; these two are closely connected, and when poverty is relieved, and idleness punished whenever it assumes the garb of necessity, and presses on the fund that is destined for its relief, the property and persons of the more fortunate classes will be found to have acquired a security that, in the present state of things, cannot exist.

This truth has attracted the attention of most civilized nations, but by always making the laws of pauperism a distinct branch of legislation, never connecting it with their penal jurisprudence, with which it has so intimate a relation, it has been a source of more perplexity and confusion, has given birth to more bad theory and ruinous practice, than any other question in government. Many of these difficulties, it is supposed, will be obviated by the application of sound principles before the evil has become so incorporated in the system as to make it difficult to be eradicated.

In relation to this subject, society is formed of two divisions ; those who, by their industry or property, provide subsistence for themselves and their families, and those who do not. The latter must of necessity draw their support from the former, either by depredations on property, which brings them within the purview of the laws for punishing crimes, or, under the reality or pretence of pauperism, by levying a tax on public or individual charity. It is to this last description that I now draw the attention of the legislature. They may be divided into three classes :

Those who can labour and are willing to labour, but who cannot find employment.

Those who can labour, but are idle from inclination, not for want of employment.

Those who are unable to support themselves by their labour, from infancy, old age, or infirmity of body or mind.

The first and last of these classes are to be relieved, not only by force of the obligation before referred to, but

from a social duty not less imperative, because it is founded on humane feelings, and is enforced by, perhaps, the best precept of that religion which places charity in the highest rank of the virtues it inculcate. This relief must be given by providing means of employment for the industrious, and gratuitous support for the helpless. The middle class includes those who, under the name of vagrants and able-bodied beggars, are placed in society on the verge between vice and crime, vicious enough to require inspection and restraint, not so palpably guilty as to justify severer punishment. abounding in large crime, they are the hot-beds, in which idleness and profligacy are forced into crime, and are properly the object of coercive justice, but they cannot become so without adopting the means necessary to distinguish and separate them from the innocently poor, and it is this necessity which brings that class also within the scope of the measures for preventing crimes. It was thought that a good system should not only restrain the vicious, and punish and reform the guilty, but, by relieving and employing the poor, put an end to one of the strongest inducements to commit offences. For these reasons the Code of Reform and Prison Discipline provides, that a building shall be erected to be called the House of Industry, with two distinct departments, one for voluntary, the other for coerced labour; the first department is intended as a place of employment for all those who are capable of gaining, by their bodily exertions, a complete or partial support; and for the few who are totally helpless. Its character, as a HOUSE OF REFUGE, will be hereafter explained; the second department is designated as a place in which vagrants and the able-bodied mendicants shall be forced to labour for their support.

This establishment enters most essentially into the plan I propose. Its different departments, under the name of poorhouses, workhouses, and bridewells, are known not only in England and the states which derive their jurisprudence from that country, but in different parts of Europe, but they are there distinct institutions,

and want that unity of plan from which it is thought their principal utility will arise. This requires elucidation. If the duty of supporting its members be once acknowledged to be one incumbent on society to the extent that has been assumed, and if the classification I have made is correct, the necessity becomes apparent of distinguishing in what degree the different applicants are entitled to relief; but that system would be obviously imperfect that was confined to making this distinction, and granting relief only to the one class without making any disposition of the others. Every applicant, if my premises be true, must belong to one or the other of those classes; and the same magistrate who hears his demand of support, or before whom he is brought, on an accusation of illegally obtaining it, is enabled at once to assign him his place. Is he able and willing to work, but cannot obtain it? Here is employment suited to his strength, to his age, his capacity. Is he able to work, but idle, intemperate, or vicious? His habits must be corrected by seclusion, sobriety, instruction and labour. Is he utterly unable to provide for his support? The great social duty of religion and humanity must be performed. One investigation on this plan puts an end to the inquiry. Every one applying for alms, or convicted of illegal idleness and vice, necessarily belongs to one or the other class, and immediately finds his place; he no longer remains a burthen on individuals, and society is at once relieved from vagrancy and pauperism. Instead of this simple process, the poor laws are generally administered by agents whose duty is confined to a selection of proper objects of charity, without power to punish the impostor who preys on the fund provided for the poor and the helpless; and without any means to enable the honest labourer or artisan to earn his subsistence. This establishment once made, on a proper scale, the plan for supporting it faithfully executed, the second degree in this scale of preventive justice will be obtained. By the first, your rising generation will be taught habits of industrious obedience to the law, a respect for religion, and a love of justice and moral duties.

By this, which is the second, those who have grown up without these advantages, those who have not profited by them, and the numerous class of adventurers from other countries, will be arrested in the earliest stages of their profligacy, and taught to be industrious before they become criminal.

I am not unaware that this plan is, in some points, founded on principles that are much questioned by many who have written on this part of social economy. Without making this report a vehicle for the full discussion of those principles, it will be necessary briefly to state the objections that have been made, with my reasons for not yielding to their force.

The policy, and sometimes the obligation, of a public provision for the poor, has been forcibly assailed in England, and by men of high reputation here. The argument is shortly this. The duty to provide for the poor is rather a moral than a civil obligation: it binds, successively, relations, friends, wealthy individuals, and, last of all, society, which can be called on to support those only who are not provided for by individuals. But if this obligation upon society be once acknowledged and acted on, the individuals who stand in a nearer relation to the pauper will at once disregard a duty which has only a moral sanction, and the government will have the exclusive charge of the burthen. And this, according to the argument, is not all: the certainty of an ultimate support will lead to idleness, extravagant speculations, imprudent marriages, and all the improvident acts that naturally produce poverty; and, in time, the number of paupers will be so great as to consume the resources of the state, or, if quartered on smaller divisions of the country, to reduce the individuals composing it nearly to the state of those whom they are forced to relieve. And the theory is supported by reference to England, where, sometimes, every fifth man is a pauper, and the poor-rates amount to one-tenth (*a*) of the whole revenue of the kingdom.

In 1821, the poor-rates were 7,225,611; the income, 100,000,000; the population, 10,000,000; and the whole popula-

In a country with a population so great as to reduce the full price of labour to a bare subsistence, and at the same time employing that labour in the production of articles for which the demand is uncertain, there is no doubt, that, at times, a permanent provision for the poor must be extremely burthensome on the community; and in such a country, an establishment to provide labour for all those whom the vicissitudes of trade should throw out of employment, would be, perhaps, impracticable, and certainly very difficult of execution. But besides its inapplicability to a different state of society, the argument is founded on the false principle, that the moral obligation of charity in individuals, whether related to the pauper or not, is superior in degree, as well as prior in the time of its exercise, to that social duty which every nation owes to the individuals which compose it; which duty is not only protection, but mutual support. That society owes protection to all its members, is not denied. But what is that protection? Certainly its chief object is life; but whether life be assailed by the sword or by famine, it is equally important for the individual, and for the community too, that it should be preserved. There are mutual obligations between society and the members who compose it, which are not written covenants; they result from the nature of the connexion, from the object to be attained by the association, which is the protection of life and property. But the preservation of life is the first object, property is only a secondary one; and if a contract is to be supposed, can it be imagined to be of a nature that would impose on any one of the contracting parties the loss of that which it was the chief end of the contract to preserve; and that too for the preservation to the others of a portion of that which was only the secondary object? In other words, can it be supposed that any just contract could stipulate that one of the contracting parties should die of hunger, in order that the others might enjoy, without deduction, the whole of their property? The obligation, then, if derived from the only source to which we can look for its conditions, includes

support as well as protection; and although this obligation may, by the operation of positive law, be justly modified by imposing the burthen of support on relations capable by their fortune of supporting it, yet even if these means are either deficient, or have not been employed, the duty returns in its full force upon the community.

That this duty is sometimes very onerous cannot be denied. A redundant population, by which there are more people than can be so employed as to earn their subsistence, is a cause of this evil, that can only be avoided by emigration, when it is the result of a natural increase; but generally it is the effect of false principles in political economy; of that system which, by premiums and duties, pampers one branch of industry into an unnatural growth, and seduces so many to pursue it, that the market is soon overstocked with the proceeds of their labour, and they are then left to starve, or become the object of public charity. A temporary foreign demand may also have the same effect; but, in that case, the community, which must have been enriched by the effects of that demand, will be better able to bear the burthen, and ought not to complain that it is forced to give occasional support to the unfortunate instruments of its prosperity. But, in a country where the ordinary price of labour is more than sufficient for the maintenance of the poor, they can only be a serious burthen in consequence of the want of true principles, or a good system of enforcing them, and the whole secret lies in the finding employment adapted to every applicant for relief. The number of those who are incapable in any degree of contributing by labour to their own support, is very small; and it is evident that, when none are idle, the cost to the state will be only equal to the difference between the proceeds of such labour and the expense of support; but the proceeds of ordinary labour are supposed, by the state of society, to be more than sufficient for maintenance; therefore, making all proper deductions for forced labour, and the other disadvantages of public institutions, the proceeds of labour, if they are properly conducted, will not fall so far

short of the expense as to create any fear of the ruinous consequences which attend the increase of the poor-rates in England.

At present, the duty of supporting needy relations is, by the law as well of England as of the different united states, confined to ascendants and descendants only. To extend this obligation, so as to oblige collaterals within the second, or perhaps the third degree, to contribute to their support, would, it is thought, not only lessen the burthen on the public, but prevent, by the advice and interference of friends, those imprudent engagements, which are the principal causes of poverty. Should it have this effect, it will lessen the weight of the objection that a public provision for the poor will increase the numbers, by rendering men adventurous in speculation, improvident in marriage, and careless in the conduct of their affairs. Most of the writers on this subject state that this effect is produced by the poor laws of England ; but it would seem that the natural love of independence, and the sense of degradation inseparable from a reliance on public charity, would always prevent this provision being calculated on as a desirable resource ; and we might rather conclude that the numbers who are reduced to this extremity by extravagance, would have been equally prodigal if no such provision had existed. However this may be, in a country where the sense of shame is deadened by misery and extensive companionship in its degrading effects, and where support is afforded without exacting its equivalent in labour, it is believed that nothing of this nature need to be apprehended in one where the natural repugnance to live on charity is strengthened by the ease with which labour can procure not only support, but competence and ease ; and where the relief that it is proposed to afford, can only be procured by bodily exertions proportioned to the ability of the party. Such are the reasonings and facts on which I have ventured to propose, as part of my plan, the house of refuge and of industry. I deem it a most essential part of the system. As prevention, in the diseases of the

body, is less painful, less expensive, and more efficacious than the most skillful cure; so, in the moral maladies of society, to arrest the vicious before the profligacy assumes the shape of crime; to take away from the poor the cause or pretence of relieving themselves by fraud or by theft, to reform them by education, and make the poor industry contribute to their support, although a difficult and expensive; will be found more effectual in the suppression of offences, and more economical, than the best organized system of punishment. An offence perpetrated, incurs the loss sustained by its commission, and frequently that of its repetition added to the expense of its punishment. To prevent an offence requires only the previous expense of education and confinement. These reasons have induced me to suggest the plan of general education, and to combine with the system I offer, establishments for the relief of pauper, and the seclusion and instruction of the vicious and idle. These institutions, although they may conveniently be placed under the immediate direction of the same superintendent, are essentially different in their character: the one is a prison, the other a place of refuge. The object of one is instruction, of the other relief. Education and industry are ends common to both. Therefore, the regulations for the one prescribe strict seclusion and coerced labour, while the confinement and classification of the other is merely such as is necessary for the maintenance of order; and the only penalty for idleness is discharge, with the certainty of being classed in the next application for relief with those who are wilfully idle. The great objection usually made to establishments of this kind, is the expense. This, in a great measure, will be obviated by a wise and prudent administration, by which labour, suited to every degree of strength and skill may be provided. In our country there are great facilities for this: gardening, poultry yards, and the different occupations of agriculture necessary for the supply of a large city, offer employments of the most profitable kind, and in which some occupation suited to every individual may be found. Add to these, a brick

or tile yard, a rope walk, chair making, all the manufactures of straw, cotton spinning, weaving, and other manufactures, of which more particular mention will be made when we speak of the penitentiary ; and it will be seen that, by proper management, means will be found to employ all the tenants of this establishment, whether in the seclusion of the house of industry, or the more relaxed discipline of the house of refuge : few are so weak and infirm as to contribute nothing towards their support ; and the great object will be that there shall be no idleness that is not the effect of infirmity. By these means, the actual expense will be much lessened ; and the comparative account, truly stated, between the cost of suffering them to live in idleness, by contributions levied upon private or public charity, or depredations upon property, and the expense of this establishment, will show a balance greatly in its favour.

We are come to that part of the system of prison discipline applicable to penal law, in that restricted sense which confines it to the prosecution and punishment of offences. In the project which I submit to the legislature, I begin with a part of the subject that has generally been most unaccountably, most injuriously neglected. The danger of vicious association is universally acknowledged ; its corrupting influence has been portrayed by every figure that rhetoric could supply, and enforced by the most energetic language of eloquence ; but its deleterious effects seemed to be feared only after condemnation, and no efficient plan has hitherto been adopted, or, as far as I am informed, proposed to any legislature, to apply a corrective to it in the incipient stages of criminal procedure. Yet here, emphatically, it is calculated more widely to spread its infection. After condemnation there can be no association but of the guilty with the guilty ; but in the preliminary imprisonment, guilt is associated with innocence. The youth who is confined on suspicion only, whose innocence at the time of his arrest is attested by his subsequent acquittal, leaves the den where he was imprisoned, with tainted morals, depraved habits,

passions excited to vengeance, and his associates to aid him in pursuits that make his second entrance to the house of detention only a passage to the penitentiary, or, in our present system, to the gallows. In our great cities, where this reform is most necessary, it is least attended to. Vice, the most disgusting, brutal intemperance, crime in its most hideous and appalling form, are there congregated, and form a mass of corruption, rendered more deleterious from the mixture of imported depravity and native profligacy of which it is composed. The bridewell of a large city is the place in which those representatives of human nature, in its most degraded shape, are assembled; brought into close contact, so that no art of fraud, no means of depredation, no art to avoid detection, known to one, may be hid from the other; where those who have escaped receive the applause due to their dexterity, and he who has suffered, glories in the constancy with which he has endured his punishment, and resisted the attempts to reform him. Here, he who can "commit the oldest crime the newest sort of way," is hailed as a genius of superior order, and having no interest to secure the exclusive use of the discovery, he freely imparts it to his less instructed companions. Thieves, and all the other offenders whose crimes are committed upon property, here receive the most useful instructions, not only for perfecting themselves in their vocation, but of the proper objects on which it may be exercised; and the comparatively short detention of a large majority gives them the means of immediately practising the lessons they have received: for it may be fairly calculated that, of those committed for trial, three-fourths (*a*) escape conviction after being detained just long enough to receive instruction in all the mysteries of crime. This view of the danger of increasing guilt, by communication between the guilty

In New York, in the year 1832, there were committed to the prison, on accusations for crimes and misdemeanors, 2361. Fewer than 541 were brought to trial, for that is the number of persons tried, including those who were not con-

in different degrees, has been often considered, and is in a great degree applicable to the association of convicts in a penitentiary, as well as in those prisons we are now considering. But, when we add to it the serious consideration that innocence and youth are at all times exposed to this contaminating influence; that laws which

mitted but bailed of these 511, 180 were acquitted; which produces this result.

Committed for trial,	2361
Convicted,	361
Discharged or acquitted,	2000
In 1823, were committed,	1928
The whole number tried that year was 599, of whom 177 were acquitted, so that the number of those convicted was	422
Total discharged or acquitted,	1506
In 1824, committed,	1961
Tried 586, acquitted 169, convicted,	417
Total discharged or acquitted,	1544
In 1825, committed,	2168
Tried 547, acquitted 161, convicted,	386
Total discharged or acquitted,	1782
In 1826, there were committed, to the 20th November,	2046
Add in the same proportion for the rest of the year,	227
	2273
Tried 662, acquitted 200, convicted,	462
Total discharged or acquitted,	1811

This is sufficient to show that, in every year in one of our cities, from 1500 to 2000 persons of both sexes, all of whom are legally presumed to be innocent, and a large proportion must be really so, are annually forced, by the operation of the laws, into the closest association with the most abandoned of their species, they must eat, drink and sleep with them. They have no retreat from the infectious atmosphere of their society; and, after having been thus forced to enter the school of vice and criminality, the 2000 disciples are turned out to practise the lessons they have learned! And this is the wise system of laws that needs no amendment! This is the humane administration of them in a rich and enlightened city!

profess to preserve the morals and purity of the citizen, are made the instruments of their destruction; what expression can be too strong to mark our astonishment at the apathy or indolence of legislation, who, knowing the evils of the system, can suffer it to continue, or who will not take the trouble to inform themselves on the subject? Indiscriminate confinement, preparatory to the trial, has, in this report, hitherto been considered only in its contaminating effect; and those effects are sufficiently dreadful. But there is another view of its consequences, its inevitable consequences, which not only shocks the understanding, but lacerates the best feelings of the heart. The only discrimination made between the white tenants of these places of confinement is that of the sexes. The women are kept in a separate apartment, the men in as many others as the prison can afford, but without any distinction between them. The innocent stranger, unable to find security, is joint tenant of the same chambers with three times convicted convicts; vagrants sunk in vice, and brutified by intoxication; perpetrators of every infamous crime, and even with murderers taken in the fact. Women of innocence and virtue are sometimes forced, by this unhallowed administration of justice, into an association with all that is disgusting in female vice; with vulgarity in its most offensive form; with intemperance sunk to the lowest depth of degradation; with everything that can be conceived most abhorrent to female delicacy and refinement. This is no picture of the imagination: the reporter has seen it. It is realized, in a greater or less degree, in all the cities of the Atlantic states: and even legislators, patriotic statesmen, and benevolent philanthropists, who have for years been legislating, and reasoning, and dedicating their time and talents to the application of solitary confinement to the purposes of punishment after conviction, have never yet taken one efficient step to prevent the pernicious effects attending indiscriminate association, or to rescue the innocent, not only from the contamination, but from the punishment

it inflicts. For, what greater punishment could be devised for a man of education and morals, used to the refinements of good society, than to shut him up night and day, for weeks and months, in a room crowded with the vilest of the vile, with men stained with every crime? or to a woman, not sunk herself in vice, to be associated with the most abandoned of her sex? Yet such is the humanity, the justice of our boasted jurisprudence! We begin by inflicting this moral punishment on one presumed, by the first principle of our law, to be innocent: we add to it the physical evil of close confinement, without any of the conveniences of life, for an unlimited period; and when, perhaps, his morals are corrupted by the society which the justice of his country has forced him to keep, and his health is destroyed by the rigour of imprisonment, his innocence is declared, and he is restored to society, either to prey upon it by his crimes, or burthen it by his poverty. What greater moral or physical evil, it may be asked, would have been inflicted on the guilty, than this which the innocent is made to suffer? An eye-witness to more than one of the scenes he has described, and which, he repeats, are not exaggerated in the description, the reporter was deeply impressed with the necessity of a radical reform in the system of detention before trial, and has embodied it in the code which he presents. Persons whose liberty, for the good of society, must be restrained, are either those upon whom imprisonment is imposed merely for the purpose of securing their appearance when the purposes of justice require it, or those upon whom it is inflicted as a punishment.

The detention of those of the first description, to be just, must not only be necessary, but must be attended with no privation that is not absolutely required for the end proposed, and for the preservation of order.

Each of these two divisions is composed of several subordinate classes, for the government of which different rules are necessary. None are comprehended in the first who are able to find a sufficient pledge that

their personal attendance will be given when it is called for. The purposes of the proposed code require that those comprising this division should form three classes :

1. Persons whose testimony is necessary for the investigation of some important crime.
2. Those accused of misdemeanors.
3. Those charged with crime.

The first of these classes is separated from the two others by an evidently marked distinction. Those who compose it are not presumed to be guilty of any offence; the temporary privation of their liberty is a necessary sacrifice for the safety of society; it is taken on the same principle that justifies the appropriation of private property for public purposes, and it carries with it the same right of indemnity; which indemnity the code does not fail to provide.

With respect to the two other classes, there is this difference, that, in these, there is a presumption of guilt, arising from an accusation on oath. The maxim, that every man is presumed innocent before conviction, is, like many other legal maxims, true only to a certain extent. In its application, it can mean only that proof must precede conviction, and that accusation alone is not one of those presumptions which throws the burden of proof on the accused, and causes him to be believed guilty unless he shows himself innocent. But it is not true as respects persons accused on oath in a legal form. This is sufficient to justify every measure for securing the person, because it creates such a presumption of guilt as raises a probability of an attempt to escape punishment, and on the degree of this probability is founded the distinction between the second and third classes; the motive to attempt an escape being greater in proportion to the magnitude of the punishment. For these reasons, the code directs that prisoners of the first class, to whom no offence is imputed, shall enjoy every alleviation of their misfortune, not incompatible with the maintenance of order, that their own means can procure. The second class consists of persons accused of an offence punishable when

proved, by a comparatively light penalty, neither the temptation to escape, nor the evil consequences to society should it be effected, are so great as to justify a rigour of confinement equal to that which is necessary to secure the third class, accused of crime. Those degrees are distinctly marked in the code, but it carefully provides that none of those comprehended in this division, shall suffer any other inconveniences from their detention, than those necessary to secure their personal appearance, and to prevent the evil association, no less requisite, to protect their own morals against the contagion of vice, for this classification is essential to the other and no less important design, which has been before stated in this report, that of separating the persons composing the two first classes from any communication with those of the third, and the individuals of this last from any intercourse with each other. The presumption before alluded to also justifies this measure. It is one of protection, from which the innocent have everything to gain, and of which the guilty cannot complain: for it imposes no unnecessary restraint, and takes from them only the power of corrupting and being further corrupted. The danger of guilty associations; the duty of avoiding them by a careful separation of the innocent from those who labour under a presumption of guilt; of those accused or convicted of offences, implying no great degree of moral turpitude, from those who are presumed or known to be guilty of crimes which evince depravity of mind and manners; of the young from the old offender; are considerations on which the Code of Prison Discipline rests; and on the Code of Prison Discipline depends the whole system of penal law. It is for this reason that classification before trial has been provided for with the same care that is required after conviction; and it has been particularly urged in the report, from a conviction that its importance in penal jurisprudence has not hitherto been properly appreciated. It is proposed, not only that the place for this confinement shall be separate from that in which it is inflicted as a punishment; but it

is called, not a prison, but a HOUSE OF DETENTION merely, that the name may not carry with it any idea of infamous punishment. The marked distinction in the penal code, between crimes and misdemeanors, the degree of moral guilt in the former, with which the latter is, for the most part, not infected; renders a correspondent difference necessary in the plan and nature of the punishment inflicted on them respectively.

After considering imprisonment as a necessary restraint merely, the only just character which, before trial, it can have, and showing the provisions in the Code of Prison Discipline adapted to this end, it remains to be considered in its double capacity, as a punishment and the means of reform.

The nature, properties and efficacy, of imprisonment, as a means of punishment, have been so fully discussed in the Introductory Report to the Code of Crimes and Punishments, that no more will be said here than is necessary to elucidate its modifications and combinations with the reformatory part of the plan.

Of imprisonment, the Code of Crimes and Punishment, directs four grades: simple imprisonment, simple imprisonment in close custody, imprisonment with labour, and imprisonment in solitude.

The two first are applied to offences involving no great degree of moral wrong, and therefore ought not to be confounded with others, in which depravity is apparent. Some loss of reputation, when the laws are just and impartially administered, necessarily is incurred by the infliction of every punishment. But disgrace ought to be attached to those only which are inflicted for crimes implying moral depravity. Hence the distinction which the law has drawn, and which the Code of Prison Discipline must execute, between misdemeanors and crimes. To mark this distinction, different places, as well as a difference of treatment, are necessary.

It would be approximating these degrees of offence too much, to confine them to the same prison, the same cell, and the same treatment, as is now the case.

guilty of breaking the provisions of mere positive law; but it would be confounding all ideas of proportion in punishment to conduct him to the same prison with the thief or assassin. A department, therefore, in the house of detention is designated for offenders of this description, whether the sentence be simple confinement or imprisonment in close custody. The discipline applicable to them is also necessarily different from that required in the penitentiary as no great moral guilt is implied in the offences of which they have been guilty, and the detention is limited to short periods, so the imprisonment is intended more for punishment than reformation. In this, as in all other places of confinement, under this system, complete separation at night is strictly enforced; the means of education and religious instruction are provided; seclusion is graduated according to the sentence; good wholesome food and comfortable lodging are provided at the public expense; labour is permitted but never enforced; vicious associations precluded, but close confinement never resorted to but when directed by the judgment, or rendered necessary to preserve the order of the prison. The distinction between simple imprisonment and confinement in close custody, is sufficiently explained in the Code of Crimes and Punishments; and the precise rules laid down in the Code of Prison Discipline for the treatment of prisoners under these punishments is calculated to prevent oppression, on the one hand, and on the other, strictly to enforce the execution of the sentence. How different in its very nature! How infinitely so in its effects, is imprisonment, under these regulations, from the same punishment as usually inflicted for slight offences! The horrors of a bridewell have been faintly described, yet it is to such that the misdemeanant under the present system, in most of the states, is committed, to pass the period of his confinement without labour or instruction; and either in the congenial association with vulgarity and vice to forget that he is in a place of punishment, or, shrinking from their abhorred contact, to find the physical evil of imprisonment increased beyond calculation by a

moral evil which is inflicted without being ordained by the law: whereas, on the plan I propose, no greater evil being suffered than precisely that directed by the sentence, and nothing left to the discretion of turnkeys or keepers, the judge is enabled, with a precision before impossible, to apportion the punishment to the offence. Heretofore, however slight the infraction of law that involved the penalty of confinement, an indefinite evil of bad association was necessarily annexed to it: and if a respectable man, for an imprudent breach of the peace, or for intemperate expression in court, should be committed to prison for a few days, it depended on the accidental circumstance of the numbers in the bridewell, and sometimes on the disposition of the keeper, or, what is worse, on the wealth of the party, to determine whether he should pass those days in a comfortable apartment, making merry with his friends, or should drag them on in the society of felons. Now, the magistrate will know the extent of the punishment he awards. Simple imprisonment is defined, its privations, its indulgences, the penalties attending the abuse of them; everything is accurately marked. Within certain limits traced by the law, these indulgences may be restricted or enlarged by the judge, not by the jailer; according to the circumstances of the offence, not according to the caprice of a turnkey, or the capacity of the prisoner to purchase his favour. And simple imprisonment, the lowest grade of corporal punishment, firmly an engine of torture to some, to others a mockery of justice, to all the means of depraved and depraving associations, becomes, in the hands of a discreet judge, an elastic instrument of coercion, that may be made to press on the smallest transgressions, or expand to fit the highest misdemeanor to which it is applied.

Imprisonment in close custody is the next grade; and here the same strict rules to limit the discretion of the keeper are applied. In all the provisions of this code the great truth is never lost sight of, that every evil inflicted on a man which is necessarily included in the sentence, should be as beneficial as tyrannical. Hence the aim is to

codes that are submitted, first, to make the judge confine himself in his sentence strictly within the limits of the discretion that is given him, and to exercise that discretion as much as possible by the application of the general rules that are prescribed to guide his judgment; and afterwards, when he has pronounced, to take away all other discretion that might alleviate, increase, or in any manner alter the punishment, except in the cases specially provided for. In the case of simple imprisonment in close custody these rules and exceptions, it is thought, will be found to answer these ends. This grade of punishment is the last and highest of those inflicted for misdemeanors; as it is intended by the Code of Crimes and Punishment, to approach the severity, but not to be attended with the degradation, of penitentiary confinement in solitude, so the Code of Prison Discipline, to give effect to this distinction, has prescribed a treatment that should mark, both to the sufferer and to others, that although the law punished his act as an offence, and doomed him to a prison for punishment, and to solitude and reflection for repentance, yet it does not confound his offence with those which, by the general consent of the civilized world, has been characterized as infamous. This important distinction, fully discussed in the preliminary report to the former Code is referred to here, only to mark the reason of the different places assigned to these two species of close custody, and to account for the different discipline by which they are respectively regulated.

We come now to the beaten ground of penitentiary discipline. The first remark necessary to explain the nature of that system I have ventured to recommend is this: that the penal code assigns this punishment to no offences but such as suppose in the offender a depravity and corruption of mind which requires the application of reformatory discipline as well as punishment—they must not be separated. And with the respect due to the great writers who have devoted their talents to this interesting subject, it may be permitted perhaps to suggest that most of them err in considering the true end of penal laws

to be either punishment alone, or reformation alone. A good system must combine them, and the great excellence of the penitentiary plan is, that the process of reformation cannot be carried on but by pain, mental sufferings which, if they do not succeed in reformation, must necessarily deter from a repetition of crime, as great a degree as any other bodily affliction could. If the reformation is complete, we have the double advantage arising from the moral restraint and the continuance of the physical as well as mental suffering. As an example to deter others, penitentiary imprisonment has been considered to be defective in this, that here the real is greater than the apparent suffering, whereas it ought to be directly the reverse; the apparent should exceed the real pain; because the object of deterring others would be attained with as little injury as possible to the sufferers—it being a principle that no more evil than is necessary to produce that effect ought to be inflicted. The principle is true when modified so as to require the real suffering to be sufficient for deterring the criminal himself, and the apparent not to be so great as to shock by a belief that it is cruel or disproportioned to the offence—but is the application of it to penitentiary imprisonment well made? The prisoner is not, say those who use this argument, always exposed to view, and, when he is seen, his appearance may not indicate the suffering which he undergoes. The misery of a restraint for years, perhaps for life, cannot show itself in the few moments of a casual visit; he appears well fed, well clothed, and the labour which he is seen to perform is moderate; there is nothing, therefore, in the aspect of the man to show the wretchedness that must be created by a whole life doomed to forced labour and degrading subjection. In this reasoning, however, we lose sight of two operations; the one going on in the mind of the convict, the other in that of the man upon whom his punishment is intended to be as an example; both of which essentially lessen the force of this objection. For the first, the sufferer becomes by habit, if exposed to his punishment, at least much better

able to bear it. Some "strange comfort" finds its way into his cell, and illuminates it with a hope which, though long deferred, does not always sadden the heart: employment interrupts uneasy thoughts during the day, and produces the total oblivion of them by sound sleep at night, and the misery of confinement for life, spread in equal proportions over each day, is so much less in any particular time, that, in many cases, the apparent is greater than the real suffering of the convict. On the other hand, he who is tempted to offend, and may be restrained by the fear of punishment, will add to that which he knows to exist, but which he does not see, all those horrors by which mystery always aggravates apprehended evils. Circumstances, too, may be superadded, to strike the imagination and increase this effect, without increasing the real suffering of the prisoner, while they augment its apparent intensity. Thus imprisonment even tested by this rule, is far from being so inefficient an engine of punishment, whether considered as the means of deterring the offender himself or others, as the objection supposes. And, even if we should discard the idea of reformation, penitentiary imprisonment has advantages which few other modes of punishment possess. It is permanent; the prison is always seen; and even if we do not visit its gloomy cells, the imagination will people them with tenants of its own creation, more squalid in appearance and hopeless and dejected in mind, than the real culprits who inhabit them; these two will have enough of suffering (discarding any but that authorized by law), to leave a lasting impression, and to prevent if any thing short of reformation can prevent, a repetition of guilt. Whatever advantages penitentiary imprisonment, however, may possess as a punishment, it is certain that all punishments, considered merely as such, have failed in preventing offences; and the severest have always without exception, been found the least efficacious. But, if punishment alone is inefficient, the reformation of the offender, if it were possible to effect it without punishment, would be so in the same or a greater degree; the

reformation of one offender would have little effect on his fellows, unless indeed as an additional inducement to proceed : but to refute this argument is nugatory, because no means of reformation have been proposed or can well be imagined, that can be applied without imprisonment or other restraint, but imprisonment or restraint is an evil to the sufferer, and all evil imposed in consequence of crime is punishment ; all reformatory discipline therefore is necessarily connected with punishment ; and it would, but for one consideration, be investigating the truth of a theory inapplicable to the subject if found to be true, were we to inquire whether reformation ought to be the sole object of penitentiary discipline. The consideration which alone renders the inquiry proper, and at the same time highly important, is this : that if reformation of the offender be the only object, and the example of the punishment is not to be considered, then the endeavor in establishing a mode of discipline should be to render it as light as possible, consistent with the end to be attained, which, by the argument, is reformation alone ; because it is a true principle, that no greater evil ought ever to be inflicted than is necessary to the end, and therefore, if some legislator, a proselyte to this doctrine, should believe that mild persuasion and indulgence were better instruments of reformation than coerced labour and restraint, and should act on this belief, the example of the punishment to deter would be lost ; and though one convict might go out a real or a pretended saint, seven sinners would pursue his track of profligacy, secure that, even if detected, instead of punishment they would receive only advice and indulgence. The doctrine, therefore, that reformation is the sole end of penitentiary punishment, deserves to be examined. If it mean the reformation of the culprit, and of all who might follow his example, as the language used by one of its advocates (a) would perhaps imply as in believing, the dispute is one only of words ; not of the punishment of one, or the reformation of one,

prevents the other from committing the crime, it must be because he fears the evil of the reformatory discipline ; he is then deterred by the example , and we arrive by different roads to the same point. But, more fairly considered, the argument is this crime is an evil, punishment is an evil to punish, therefore, is to multiply instead of diminishing it, unless it will deter the offender as well as others but it is proved, by long experiment, that punishment has failed in this effect : therefore it is useless. Again, experience has proved that severe are much less efficacious than milder punishments , it is fair, then, to believe that the more you diminish the severity of your laws, the more efficacious will be their operation and by one consequence further, if crimes decrease in the same ratio with the severity of penalties, that it is not the penalty that deters , and if it does not deter, it is not only useless but wrong, because we set out with the incontrovertible position that this is the only legitimate object of punishment if crimes have been diminished by penitentiary imprisonment, then it could not have been the punishment that operated, it must have been something else, and that something should be the great object to keep in view it is reformation.

A great error at the bottom of all this reasoning is one already referred to, that reformation is considered abstractly, without any consideration of the means by which it is to be brought about, which is the evil or the punishment of seclusion, and which is inseparable from it ; another not less striking is, that, supposing reformation effectually to prevent a repetition of the crime by the offender, the reasoning gives us no means of discovering how this will operate to deter others, except through the fear of the reformatory discipline, which, being from its nature a punishment, is discarded by the argument from having effect. The other fallacies are, first, in placing crime and punishment as evils of the same nature. Crime is an evil operating on society ; punishment, in the just degree that will prevent or lessen crime, so far from being an evil, is a good ; its pain is

only felt by the delinquent : the immediate pain of the crime may perhaps only affect the individual sufferer by it, but the alarm it creates, the certainty that, unless repressed, it will be repeated, spreads through the whole community, and the uncertainty who will be its next victim, makes it an evil to all. The error lies in taking that for granted which is in dispute, that the dread of punishment does not deter from offences. And when that comes to be proved, it is done by another fallacy : there have always been punishments, and there have always been and still are offences ; if punishment would prevent them, there would be none. But my argument is, not that punishment will totally prevent, but that it will diminish crimes ; and in order to prove that it has not this effect, it would be necessary to show a state of society in which there was neither punishment nor crime. Besides, to convince us that punishment in its nature can have no effect, it must be shown to have failed when applied in its most perfect form. But no one pretends that this experiment has been ever tried : on the contrary, those who contend for its efficacy, when properly applied, have demonstrated that, throughout the world, it has, in all ages, been woefully deficient. No one has yet gone so far as to draw the conclusion that, because mild have generally been found more efficacious than severe punishments, therefore no penalty ought to be annexed to offences ; and yet, if we assert that reformation is the only object, this is the plain and inevitable result ; for then every pain, however small, inflicted as a punishment, would be a useless, and therefore an improper evil.

Imprisonment, therefore, is to be used, in the plan I propose, to punish as well as to reform. But to make imprisonment, especially if coupled with labour, a proper sanction, its details must be strictly defined by the law. Any discretion left to the jailer as to the mode of punishing it makes him, and not the judge, the arbiter of the criminal's fate. He may, without proper limits to his discretion, change the sentence of a few years con-

finement into the same period of exquisite misery, followed by loss of health or of life; and he may do this without incurring any penalty; for where a full discretion is given, there can be no penalty, except in extreme cases, for its abuse. If he may, at his discretion, inflict stripes for disobedience or want of respect; if, in the language held from the bench in New York, it is his duty, "by all the means in his power, to make the convicts feel the awful degradation and misery to which their vicious courses had reduced them," and "that the ordinary sympathies of our nature could not be extended to them;" if this be permitted, or especially if inculcated as the duty of the keeper, imprisonment is the worst of all punishments, because the most unequal. It is, then, no more the wisdom of the law applied to the case by the discretion of the judge that apportions the punishment, but the caprice or passion of an individual in the exercise of a fearful duty of forcing a convict to feel the *awful misery and degradation* of his situation. If labour be superadded as a punishment, the danger of this discretion is greatly increased. The same labour may be misery and death to one, and no more than wholesome exercise to another; and the greatest abuse and oppression may be justified by enforcing a literal execution of the sentence. The law, then, must, in every particular that can be foreseen, regulate the conduct of those to whose keeping the prisoner is to be committed; and after every precaution that human prudence can take, the carelessness, or passion, or pride of opinion in the keeper, may greatly counteract the operation of a good system; and his intelligence, firmness, humanity, and strict attention, may correct some of the evils, and supply some of the omissions, which even the best cannot escape. For this reason the importance of this office is inculcated in the text of the code; and the qualities required for its exercise are pointed out as a guide to the selecting power, and a lesson to him who is chosen, that the one may not commit the fatal error of under-
rating the talents necessary for the employment, and

that the other may feel the dignity with which he is invested, as well as the responsibility imposed on him by the law. This was the more necessary in order to counteract a prejudice against the employment of those to whom the custody of prisons has been for many ages confided. A well-founded prejudice, while the jailer was only appointed to prevent the escape of the promiscuous assemblage of vagrants of both sexes, consisting of unfortunate debtors, of innocent or guilty prisoners committed for trial, and of convicted felons awaiting an ignominious death, who were placed in his custody; while he had no moral duty to perform, and was the mere Cerberus to guard the doors of a terrestrial Tartarus, such a prejudice was just and unavoidable; and as one part of the duty of a jailer, to prevent escapes, necessarily continues to be vested in the warden, the enunciation in the code becomes proper, in order to break the chain of ideas which might otherwise, from that circumstance, assimilate the character of an officer calling for high talents, and honour and integrity, with that of an employment, the natural tendency of which was to make him who exercised it an extortioner and a petty tyrant.

I return to the position, from which I may seem perhaps to have digressed, that the law should be so framed as to restrict as much as possible the discretionary power of the keeper; it must designate the punishment due to the offence, either by an invariable rule, or by a discretion left to the judge to make one within certain limits. The judge must apply this rule, by declaring the punishment, if it be fixed; by apportioning it to the degree of the offence, if he have a discretion. The punishment once ordered, that system is strangely defective which unnecessarily permits it to be aggravated or alleviated by an inferior officer, at his will. It deserves a worse epithet than bold out. temptations for him to do it; and the strongest that could be used to express disapprobation is required, if it is inculcated as a duty. But the system of forced labour makes this discretionary.

power unavoidable; for nothing, we are told, (and I believe told truly,) nothing but the lash can preserve the proper discipline in such an association. The punishment, then, necessary to execute the sentence of the law, in this plan, so far from being directed by the sentence, one expressly prohibited by the law under which that sentence is pronounced, and therefore ought never to enter into any subordinate part of the system. What could be more incongruous than to snatch the scourge from the hands of justice to place it in those of caprice; to declare it too severe, and degrading, and demoralizing, and unequal, to be applied as a punishment for crime, at the sound discretion of the judge, and, at the same time, direct that it shall be inflicted for disobedience to a subaltern officer of a prison at his pleasure? I could not, therefore, offer any plan of imprisonment that would make this absurdity necessary. Other disadvantages which are inseparable from this discipline, have been detailed when I described that of the New York prisons, of which it forms so prominent a feature. I discard it, therefore, being firmly convinced that, as an instrument of punishment, it is not only defective and dangerous, but that it cannot be brought to produce that reformation which is one of the essential parts of my plan. But social labour, whether general or in classes (if those classes are at all numerous), cannot be carried on without it, unless the security and order of the prison be put at hazard. Social labour, therefore, must be abandoned, or so modified, and admitted with such precautions, as to render this anomaly unnecessary. The manner in which this has been attempted, requires some previous examination of the principles on which it is founded.

We have, in former parts of this report, considered the question, whether punishment, as an object distinct from reformation, should not enter into the sanction of penal laws; and were brought to the double conclusion, that it was necessary, and that no reformation could be produced without it. Imprisonment has been examined

as a means of inflicting punishment, and in this and in the introductory report to the Code of Crimes and Punishments, has been compared with other corporal punishments, and been found to possess, in a greater degree than any other, the essential properties to render it effectual. Here we need only add, that there is no other means by which a reformatory process (necessarily requiring time and a succession of operations) can be carried on; no labour, no instruction, without detention, no reformation without employment, without instruction, religious, moral, and literary. It must be remembered that we are now speaking of the prison discipline proper for convicts, for men already corrupted; to whom, for the most part, labour was necessary for support, and who resorted to crime in order to avoid it. Labour consists of a number, of a succession of bodily exertions, always painful when first endured, becoming tolerable only by the habit of making them, and never voluntarily resorted to but from the hope of some enjoyment they are to produce; these two causes combined give to an occupation, painful in itself, all the characteristics of a pleasurable pursuit. Habit destroys the sense of bodily pain; hope anticipates the reward it is to bring, identifies the enjoyment with the means of procuring it, and, by a wise use of the faculties bestowed by our beneficent Creator, labour becomes cheerful, and its pain a pleasure. This might be further illustrated by investigating the cause of pleasure resulting from the chase, and other laborious recreations, which are often voluntarily pursued so far as to become toilsome and fatiguing in a degree not frequently suffered by the severest labour. In these pursuits, indeed, the exhilarating effects of fresh air, of society, and a view of the beauties of nature, give a present enjoyment that is not found in daily employment; but these would never induce us to go beyond the point of agreeable exercise: they are pushed into excess by the causes that have been stated, and by the satisfaction arising from a consciousness of dexterity. The anticipation of the applause he will receive

ceive, of the festivity, or the domestic comfort, that awaits his return, is identified in the mind of the sportsman with the fatigue he undergoes, the pain of which habit has already alleviated; so that the toils and the pleasures of the chase have become terms that are nearly synonymous.

The great painter of human passions has beautifully delineated this association, in the picture of a young lover toiling through a servile employment, with the hope of being rewarded by the presence of his mistress, and referring the patience and even the pleasure with which his toil was endured to this very illustration :

There be some sports are painful, but their labour,
Delight in them sets off.

Whenever this association of ideas is broken, labour is regarded as an evil unmitigated by any alleviating circumstance; no habit will induce a continuance of it, and it will never be resorted to but in moments of pressing distress, the idea of which then becomes incorporated with it and embitters its pains. Labour forced by stripes must always produce this dreadful concatenation of ideas; and whenever the coercion ceases, the natural aversion to fatigue will combine with the remembrance of the evils with which it was embittered, and make the culprit fly to vice to forget, or to crime to avoid it.

If these reflections be well founded, employment should be offered as an alleviation of punishment, not superadded to aggravate it. Although labour is painful, yet the separate exertions, of a succession of which it is composed, are not so in themselves; it is their repetition only which makes them irksome: there is an innate love of action in human nature, which renders its restraint the principal evil attending imprisonment: and involuntary idleness, unbroken by any mental or bodily occupation, creates a degree of suffering which, setting aside acute physical pain, can only be aggravated by uninterrupted solitude. Solitude without physical employment may be rendered tolerable, if the mind can be diverted from its own reflections by receiving intellectual instruction from others,

or amusement from books. these, also, except so far as concerns a future life, are indulgences withheld from the convict by the tenor of his sentence.

Next to the privations of liberty and employment, and perhaps superior in intensity to the last, is that of the usual indulgence of the appetite for food and drink: to inflict this, so far as to make the patient suffer by hunger or thirst, would be at war with the first principles of the system; it would be causing an evil, the degree of which could never be measured so as to be directed by the sentence; and if left to the discretion of an executive officer, would cause a suffering not directed by the law or the judge; and in most cases would change a sentence of confinement into one carrying with it loss of health or life. food, therefore, wholesome in quality, and in abundance sufficient to satisfy the appetite and support life, but of the plainest kind, without any variety to stimulate, or delay to gratify the appetite, is allowed to the convict, but it is all he is entitled to; and thus another privation is added to those already enumerated, as concomitants of the punishment directed by law. But this is not all: man desires not only liberty, recreation, and the indulgence of the appetite; but also a shelter and clothing, fitted to the variations of the season: and in civilized life there are certain refinements of indulgence in these articles, the privation of which becomes a severe punishment, when we are reduced to what is strictly necessary. The action of these natural inclinations, their restrictions and partial indulgence, constitute the moving power of my system of punishment and reformation.

Imprisonment, solitude, want of occupation, either for the mind or body, coarse aliments, hard lodging, clothing of the roughest kind, are the evils of which punishments are composed; their duration, their intensity, their cumulation, are the means provided by the Code of Crimes and Punishments, for adapting them to the different degrees of their alleviation in different degrees, are those provided in the Code of Reform and Prison Discipline.

If the reasoning already employed be correct, no succession of involuntary acts to which adults may be coerced is likely to produce permanent habits of reformation : they must be the effect of the will, operated upon by the judgment, producing a conviction that such acts are beneficial ; and experience must enforce this conviction, by giving the actual enjoyment of some, and the certain hope of other benefits, that are the result of these acts. With evil habits it is different : for the most part they are acquired by a repetition of acts procuring sensual enjoyment ; and the judgment has so little agency in producing them, that it must be silenced or perverted before the acts of indulgence are done or repeated. It is for this reason that the work of reformation is more difficult than that of perversion : the one requires intellectual power sufficient to prefer a distant and moral good, to a present and physical enjoyment : the other coincides with the natural propensity for present enjoyment, reckless of what an uncertain futurity may produce. And for this reason also it is that the work of reformation is slower in its operation than that of corruption. A single instance in which distress has been alleviated, or expected good has been realised by labour or exertion, would have but a temporary effect ; the operation must be repeated, and be made always to produce the same result, and the judgment must be thoroughly convinced that this result is invariable, before it can counteract in the will the natural preference of present enjoyment to future good. But to produce this effect, the mind must be improved by intellectual instruction ; it must be taught that there are other pleasures besides those of sense ; and religion must be brought to bear its part on the work of amelioration. The deep solitude of the prisoner's cell, the awful impression which must be made on his mind, by contrasting the fleeting enjoyment produced by his crime with the lasting evil in which he is plunged by its consequences ; the privation of factitious excitements ; with no companions to applaud his perseverance in wrong ; no means of

drowning reflection by intemperance: no acute or disproportioned pain to brace him up against real or fancied oppression; the heart must necessarily be softened and the spirit subdued, and the mind prepared to receive those great truths, which, under such circumstances, may be inculcated to the highest advantage, more especially when this, combined with literary instruction, is offered not as a part of the sentence, but as an alleviation of its rigour.

The spring, then, which sets in motion my whole machinery for producing reform, is this: that all the acts which, by their succession, are to produce habits of good, are to be performed voluntarily, and are offered as alleviations of the severity of the sentence: the will must act, or the repetition will produce no effect. But, to operate on the inclination, sufficient inducements must be held out to overcome the natural repugnance to labour, and this brings me back to the detail of those modifications of imprisonment, and its concomitant labour, which I offer instead of the strict seclusion of the Pennsylvania (*a*), or the severe discipline of the New York system.

To understand them, a clear idea must first be given of the place of confinement. It consists of an arched cell for each prisoner, of small dimensions, but well ventilated, and comfortably warmed, communicating with a small court, surrounded with a high wall. The sentence of the law is confinement to the cell, supported by wholesome but coarse food, in sufficient quantity to satisfy hunger, but without occupation, and with no other society than the attendance of those officers who minister to the physical wants of the prisoner, and to his religious instruction. Privation of employment is denounced as a part of the punishment; and this circumstance alone

(a) Mr. Roberts Vaux, one of the commissioners for building the new prison, a gentleman to whose instructive publications and conversation I am indebted for much useful information, has informed me that the plan of strict seclusion which I have quoted has never received the sanction of the legislature, and that there is a probability it will be so modified as to admit of labour and instruction.

would, with most men, cause it to be considered as an evil, and the experience of its effects will soon cause it to be felt as such ; of course it will be connected with the idea of suffering ; and occupation being denied, will, from the propensity to wish for that from which we are expressly debarred, be estimated as a good, and desired with an intensity proportioned to the strictness and length of the privation. To strengthen this natural desire, other inducements are offered. He who labours lessens the expense of his support, he who works skilfully and diligently may more than repay it. The advantage of this beneficial result must be felt by the prisoner as well as the state : if the proceeds of his work should not be sufficient to cover his expenses, it yet produces for him a better diet ; and if persevered in, and accompanied with good conduct, for certain probationary periods of six and twelve months, during which he is permitted in the day to leave his cell and pursue his solitary employment in the court, he is indulged with the privilege of working, and receiving instruction in a small class, not exceeding ten ; but, if he acquires such proficiency in his business as to make the proceeds of his industry exceed the expense of his support, he is allowed the immediate enjoyment of a part, to be laid out in books, or such other articles as he may desire. Those of food or drink are excepted, in order to avoid irregularities that would otherwise be unavoidable ; and the residue of the surplus is an accumulating fund to be paid to him on his discharge. To give the greater effect to these inducements, they are not offered to the convict on his commitment to the prison ; first, he must know and feel the unmitigated punishment ; his own reflections must be his only companions for a preliminary period, during which he is closely confined to his cell ; he must live on the coarse diet allowed to the unemployed prisoner ; he must suffer the tedium arising from want of society and of occupation, and when he begins to feel that labour would be an indulgence, it is offered to him as such ; it is not threatened as an evil, nor urged upon his acceptance as an advantage

to any but to himself, and when he is employed, no stripes, no punishments whatever, are inflicted for want of diligence; if not properly used, the wheel, once well drawn, and he returns to his solitude and other privation, not to punish him for not labouring, but merely because his conduct shows that he prefers that state to the employment with which employment must always be associated in his mind, in order to produce reformation. If it has been shown that involuntary acts of employment will not produce a lasting habit, then, if there be any such as will not accept these alleviations of their imprisonment upon them the imprisonment must operate solely as a punishment. But experience shows that these exceptions will, if any, be very few for employment, even under the lash, is in most cases preferred to solitude.

It is no unimportant part of this plan, that education and intellectual improvement, as well as more physical enjoyments, are held out as inducements for the exercise of industry, skill, and good conduct. These are to be rewarded by the use of books combining entertainment with instruction; the instruments, and other means, of exercising the mind in science, or the hand in the delicate operations of the fine arts, of developing talent or improving skill. Such pursuits offer, perhaps, the most efficient means of reformation; they operate by reconciling the convict to himself, which is the first and most difficult point to be gained. The daily exercise of mental powers, the consciousness of progress in useful knowledge, must raise him in his own estimation; and this honest pride, once set at work, will do more to change the conduct and purify the heart, than any external agency, however constantly or skilfully applied.

Let it not be said that this is a theory too refined to be adapted to depraved and degraded convicts. Convicts are men. The most depraved and degraded are men: their minds are moved by the same springs that give activity to those of others; they avoid pain with the same horror, and pursue pleasure with the same ardour, that the most virtuous mortals. It is the same in all men.

only of these great motives that produces the criminal actions which they prompt. To turn them into a course that will promote the true happiness of the individual, by making him cease to injure that of society, should be the great object of penal jurisprudence. The error, it appears to me, lies in considering them as beings of a nature so inferior as to be incapable of elevation, and so bad as to make any amelioration impossible; but crime is the effect principally of intemperance, idleness, ignorance, vicious associations, irreligion and poverty—not of any defective natural organization; and the laws which permit the unrestrained and continual exercise of these causes, are themselves the sources of those excesses which legislators, to cover their own inattention, or indolence, or ignorance, impiously and falsely ascribe to the Supreme Being, as if He had created man incapable of receiving the impressions of good. Let us try the experiment, before we pronounce that even the degraded convict cannot be reclaimed. It has never yet been tried. Every plan hitherto offered, is manifestly defective, because none has contemplated a complete system, and partial remedies never can succeed. It would be a presumption, of which the reporter's deep sense of his own incapacity renders him incapable, were he to say, that what he offers is a perfect system, or to think that it will produce all the effects which might be expected from a good one; but he may be permitted, perhaps, to believe, that the principles on which it is founded are not discordant; that it has a unity of design, and embraces a greater combination of provisions, all tending to produce the same result, than any that has yet been practised. Whether those principles are correct, or the details proper to enforce them, the superior wisdom of the legislature must determine. But, to think that the best plan which human sagacity could devise will produce reformation in every case; that there will not be numerous exceptions to its general effect, would be to indulge the visionary belief of a moral panacea, applicable to all vices and all crimes; and although this would be quackery in legisla-

tion, as absurd as any that has appeared in the history of the law, to say that there are no general rules by which the education of the mind may be produced is as great an error as to assert that there are in the history of the law no useful rules for preserving the general health and the vigour of the patient.

A reference to the text of the code is all that is necessary for the details by which it has been endeavoured to temper the rigour of solitary confinement by manual employment and instruction, as a favour, to be withdrawn when neglected or abused; by the hope of enjoying society after a probationary period; and by the immediate rewards of labour and skill, in procuring food and comforts and other conveniences. The indulgence of society in labour and instruction, which is offered as the greatest inducement to good conduct, has its value enhanced by the delay and perseverance in industry, which are prescribed as necessary to its attainment, and when granted, the number in each class is so small as to preclude the necessity of any severe discipline to maintain order, which, it is supposed, may be preserved by the precautions that are prescribed, by the fear of forfeiting the privilege, and by the advance towards reformation, which must be made before the indulgence is granted.

The average term of confinement may be assumed to be from four to six years, for such crimes, affecting property, as are attended with no circumstances in their commission to show greater depravity than the crime itself supposes; of this time, six months must necessarily be spent in solitude, with no alleviation but labour; twelve more in the same confinement, unless a desire for intellectual improvement (the evidence of the first step towards reform), should have diversified it by intervals of social instruction; and the remainder of the term, in continuing those lessons, and in perfecting that dexterity in mechanical employment which is best acquired in society. A period thus passed, without any possibility of returning associations, with the daily repetition of the same lessons, and the gradual progress of the mind, is

precepts but those of religion, morality and science, and
 formulated not in the harsh language of reproach,
 but in the mild yet firm accents of advice, pronounced by
 men who take an interest in the welfare of the convict ;
 and with the cheering prospect of regaining, by honest
 industry, that good opinion of society, which no one ever
 loses without regret : a period thus passed, it is confidently
 believed, must efface bad impressions, must create lasting
 habits of industry and virtuous pursuit, must discharge
 the subject of this discipline from the prison a better, a
 wiser, and a happier man than he entered. But these
 happy effects will be counteracted ; the care, labour and
 expense of your reformatory discipline will have been
 uselessly incurred ; if you proselyte to virtue and industry
 is to leave the one exposed to the seduction of his former
 associates, and the other rendered useless by the want of
 means to exert it. It will be in vain that you have given
 him the skill necessary for his support, if no one will
 afford him an opportunity of using it ; or that you have
 made him an honest man, if all the world avoids him as
 a villain ; his relapse is certain, unavoidable, and his de-
 pravity will be the greater, from the experience that
 reformation has been productive only of distrust, want,
 and misery. "Seven evil spirits" will take possession of
 the mind that has been "swept and garnished" by your
 discipline, and "the last state of that man shall be worse
 than the first." To avoid this result, so destructive of
 the whole system, an asylum is provided in the House of
 Refuge and Industry, (the other departments of which
 have been already described). Here the discharged con-
 vict may find employment and subsistence, and receive
 such wages as will enable him to remove from the scenes
 of his past crimes, place him above temptation, confirm
 him in his newly-acquired habits of industry, and cause
 him safely to pass the dangerous and trying period
 between the acquisition of his liberty and restoration to
 the confidence of society. Independently of this resource,
 the industrious convict receives, at his discharge, a proper
 proportion of his surplus earnings ; he receives friendly

advice as to his future pursuits, and a certificate of his merits (it) of such conduct as will entitle him to confidence; the consequences of a conviction are fully represented to him, and his conduct, if he remains in the neighbourhood of the prison, is carefully watched; and if he return to habits of idleness and intemperance, his career to crime may be stopped by a commitment to the House of Industry as a vagrant. The cause, the temptation, or the excuse for relapse, being thus removed, it is hoped that instances of return to vicious pursuits will become more rare, and that many will become moral members of society, who, under the present system, either burthen it by their poverty, or prey upon it by their crimes. The House of Refuge is rendered the more necessary, because a man of prudence will no more receive or employ a convict discharged from one of our present penitentiaries, than he would shut up with his flock a wild beast escaped from its keepers: but the reformatory plan, once fairly in operation, its principles studied, developed, steadily adhered to, improved by the light of experience, and its beneficial effects upon morals perceived, the man who has undergone its purifying operation will, in time, be no longer regarded with fear or contempt, and society, by confiding in his reformation, will permit him to be honest; the House of Refuge will then become less necessary, and its expense, of course, diminished (a).

Before I quit the consideration of this establishment, it may be necessary to dispose of an objection sometimes raised to it, as well as to the penitentiary: that the

(a) This theory is confirmed by experience in the House of Refuge at New York. Although admission into that school is obtained only by renunciation on conviction; yet, such reliance is placed upon the reformatory effect of the discipline, that the applications for apprentices of both sexes are so numerous that they cannot be complied with. Nor is the result disappointed; a single instance only having been known in which an employer was dissatisfied with the conduct of his apprentice. After the removal to the City of New York, the same effect was produced in a more rapid manner.

products of mechanical operations, which may be carried on there, will be sold cheaper than they can be afforded by the regular mechanic, who is burthened with the support of a family, with rent, taxes and other charges, and thus injure the innocent, in order to find employment for the guilty. This objection could only have weight if all the convicts were employed in one business, and that in a country where there is a greater supply of labour than there is a demand for it; but here the very reverse of this is the fact. Again, if all the convicts should be employed in a single occupation, it must be because there is an excess of demand for that species of labour over the supply; and while that continues, there can be no injury: when that demand is reduced, the business will be abandoned both within and without the prison. As respects the public interest, there can be no doubt, for the question reduces itself to this—whether the convicts are to be maintained in idleness, or suffered to contribute by labour to their own support? And even as regards particular classes of mechanics, the same reasoning which would prevent their trade being carried on in prison, would go to show that it ought to be limited without. But the best answer to the objection is, that experience has never realized any of the evils that have been apprehended.

Having passed through the different stages of confinement with the prisoner committed for a term; having shown the hopes and fears, the occupation, instruction, and discipline, by which he is to be punished and reformed; and, having unlocked the door of his cell, and restored him to the world a renovated man; we must return once more to the interior of the prison, to visit those who have by their atrocity rendered it unsafe to trust them in that society, the very existence of which their crimes have put to hazard. They are those whose offences are now punished with death. Reformation enters no farther into their treatment than as it concerns them individually. Shut out for ever from civil society, the laws provide no means for their future employment; it is indifferent as to their habits, and solicitous only

that, for their own sake, they should make their peace with heaven: for, in avoiding to punish what they would not "kill the soul."

The confinement of this class is intended to serve two purposes only: first, by actual restraint, to prevent a repetition of the crime. Next, to deter from committing a similar one, by the severity of the punishment. These two purposes are attained by absolute seclusion, under circumstances varied according to the enormity of the offence. These circumstances are calculated to strike the imagination with horror for the crime, without awaking any dangerous sympathy for the sufferer. A gloomy cell; inscriptions recording the nature of the crime and the intensity of the punishment, so much of mystery as excites the imagination, and suffering enough to deter when the veil is withdrawn not so much as to enlist the feelings of the community and make them arraign the cruelty of the law, perfect security from escape; a gradation in the discipline to show, by strong features, the different degrees of atrocity of the crime; such are the characteristics of the punishments substituted for that of death, now inflicted for the different species of capital homicide. These convicts are considered, for many purposes, to be as much dead to the world as if no commutation of their former punishment had been made; their property is divided among their heirs; they are buried in their solitary cells, and their epitaph is contained in the inscription that records their crimes, and the daily renewal of its punishment. Their existence is preserved by the policy of the law, for reasons which it has proclaimed; and, although they are kept within the reach of the pardoning power, yet that policy will be counteracted by any remission of the sentence, the case of acknowledged innocence alone excepted. Those who are confined for life, for a repetition of crime, are considered more in the light of incorrigible and dangerous offenders whose ferocious disposition renders their removal necessary for the peace of the community.

penitentiaries sometimes succeed in cases that were deemed hopeless, and the subjects of this observation have obtained the same advantages of instruction and reformation, that are given to the other convicts. In the hope that, by unequivocal evidence of reformation, after a very long probatory period without relapse, they may be discharged by the pardoning power it is highly important, however, that this should not be lightly or frequently exercised. Few circumstances have tended more directly to disappoint the friends of the penitentiary system, than the counteractive operation of the pardoning power. parsimonious legislative provisions have furnished an excuse for its exercise, to a degree that rendered every attempt to punish or reform by imprisonment equally abortive; and, if the unhappy facility of granting pardons be not checked, it is in vain to hope that the best organized plan will produce any good effect. The inmate will be suffered with impatience, instruction will be unheeded, labour neglected, and counsel derided, while the mind is kept in the feverish state of expectation, which the daily release of fellow convicts, more easily, perhaps, but better befriended, must produce on those who remain. In some states this abuse has become so prevalent, that the culprit has not only in his favour the chance of escaping detection, or, if detected, the chance of acquittal, but, after conviction, it has become more probable that he will be discharged by pardon (*a*), than that his sentence will be executed. With so many chances in his favour, the felon continues his game without fear or scruple. The prison loses its terrors as a place of punishment, and its discipline becomes a mockery to those who remain, cursing their ill fortune, and hoping that, in the next lottery of pardons, they may gain the prize of discharge. Before I passed from the penitentiary discipline to

(a) In five years, seven hundred and forty convicts were discharged by pardon from the New York Prison, and only seventy-three by the expiration of their sentence, making the chance of impunity after conviction, more than ten to one in favour of the convict.

another branch of my subject, it was necessary to advert to this radical, and, unfortunately, in most of the state, this constitutional evil, to which, of course, no other remedy can be applied by the legislative, than the voice of expostulation with the executive power. A very able report on this subject, made by the direction of a society for the prevention of pauperism in the city of New York, in the year 1822, contains the opinions of the most celebrated jurists and magistrates in every state in the union, all of whom concur in stating frequent pardons to be the greatest obstacle that the penitentiary system has to encounter. Out of it has arisen another evil; soliciting pardons has, in some places, become a business; men who disgrace an honourable profession, hang about the doors of the prison, bargain with the convict, to be paid, perhaps, out of the proceeds of his crime; by importunity or false statements, procure the signatures of respectable men to petitions, deceive the executive power by false allegations of reformation, and procure the pardon of the most hardened offenders; who use their liberty only to commit new depredations, in the hope of again being released; and, strange to tell, this hope has been realized after a second and even a third sentence. Out of sixteen committed for a second offence to the New York penitentiary, in 1825, eleven had been discharged by pardon, and of those committed in the same year for a third offence, every one had been previously twice pardoned. To arrest, if possible, the progress of this abuse, which totally counteracts every attempt to punish or reform, the text of the code is made to express the wishes of the legislature, and a provision is introduced, making the soliciting of pardons, for reward, a punishable offence.

One other institution remains to be described; one of perhaps quite as much importance as any other in the system. It is the School of Reform; designed for the reformation, and discipline, and instruction of juvenile offenders and young vagrants. Of all the establishments in the city, and extended to the entire and

enlightened benevolence of modern times, none interests more deeply the better feelings of the heart. Whether we consider the evil avoided, or the positive good bestowed, it is equally worthy of our admiration.

The provisions of law have heretofore denounced the same punishment against the first offence of a child, that they awarded to the veteran in guilt; the seducer to crime, and the artless victim of his corruption, were confounded in the same penalty, and that penalty, until lately, was here, and in the land from whence we derive our jurisprudence still is—death. We have substituted imprisonment; but our laws make no other distinction between adults and children, than that contained in the common law, by which all above a certain age, and that a very tender one, are supposed to have sufficient discretion to know both the law and its penalty; and as to those who have not attained that age, it is a matter of inquiry to be determined by evidence, and an instance is recorded, in which an infant of nine years was convicted and executed for murder. For the minor offences, affecting property, indictments against children are frequent, and humanity is equally shocked, whether they are convicted, or, by the lenity of the jury, discharged, to complete their education of infamy. In the penal code which you have under consideration, some material changes are introduced on this subject; an age is fixed, below which guilt cannot be supposed, and the inquiry as to discretion can only take place when the accused is above that age, but below another, at which sufficient capacity may always be presumed. It also contains other provisions, which govern the case in which a child does the prohibited act, in the presence, or under the influence of a parent or superior. But, with all these modifications, nothing materially good under this head would be effected, if, after conviction, the same discipline were indiscriminately applied to children and adults. The necessity of a different course, whether for punishment, or education, or reform, is so clearly pointed out by nature, that he must be an inattentive observer of her laws, who does not per-

ceive it, and it should be considered, that, when a child of tender age commits an offence against the law of society, he acts, for the most part, in obedience to one which with him has a paramount force—that of nature—who has given him strong desires to possess an ardent passion for novelty, and a free spirit, that with difficulty submits to restraint; while she has withheld that discretion which alone can give a voluntary control over those passions. For acts committed before this discretion is acquired, or when, by the visitation of Providence, it is taken away, it is unjust to punish, although the good of society requires that we should restrain. Paternal, or any other authority that represents it, stands in the place of this discretion, until it is conferred by instruction, experience, and the natural expansion of the faculties. To this domestic lawgiver and judge, is confided, during this interval, the task of repressing all the faults of infancy; and when they become hurtful to others, he, not the child whom he ought to have restrained, is answerable; civilly, if the injury were done without his connivance or permission; criminally, if it were. These are the dictates of most laws, applicable to a period of infancy more or less indefinite, according to different systems; but, after that period, they all abandon these sound principles, and hold the child personally accountable to the penal law; and if he has shown dexterity in committing the crime, or used shifts to avoid detection, it is, by the common law, counted sufficient evidence of a consciousness of moral guilt, and of a discretion that ought to have prevented the offence. But they do not consider that the moral sense is, in childhood, produced by instruction only, and the force of example, and that, with the children who are generally the objects of criminal procedure, instruction has either been totally wanting, or both that and example have been misapplied to pervert, not form, a sense of right; so that, in the want of discretion essential to the protective power of the law, it is due to the adolescence of children quite as much as to their infancy. Hence, when a child

of the law, and confirmed by the laws of the community, they are thrown friendless and unprotected into the most contaminating associations, where truth, religion and temperance are spoken of only to be denied, and the restraints of law are studied only to be evaded. In either of these cases, these unfortunate victims to the vices of others, have a right to demand that the community shall supply the place of their natural protectors, and teach them the sanction of the law before they are punished for its breach. In a country governed by wise laws, faithfully executed, this class of children would be very small; moral, religious and literary education would be brought, in such a country, within the reach of every individual, and he would be bound to avail himself of these advantages; ours, in this respect, is not yet such a country. We are rapidly advancing towards this degree of perfection; but, until we attain it, the defect in this part of our system increases the obligation on the community to be a father to the fatherless, to snatch the innocent child from the hands of depraved parents, and the orphan from the contamination of vice and infamy; and, instead of harsh punishments, inflicted for offences which its own neglect of duty has occasioned, to remove their cause by the milder methods of instruction and useful employment.

The place for the confinement of juvenile offenders, for these reasons, is to be considered more as a school of instruction than a prison for degrading punishment; a school in which the vicious habits of the pupil require a strict discipline, but still a school; into which he enters a vicious boy, and from which he is to depart a virtuous and industrious youth; where the involuntary vices and crimes with which his early childhood was stained, are to be eradicated, their very remembrance lost; and, in their place, the lessons inculcated, and the examples given, which would have guided him, had the duties of nature and society been performed. From hence he begins his career in life; and as it would be unjust to load him, on his outset, with the opprobrium which would be insepa-

rable from an association, in the same place of punishment, with hardened offenders, it became necessary, as well from this circumstance as from the different nature of the discipline, to separate this entirely, both by locality and name, from the other prisons.

To argue the utility, or to descant on the humanity of this establishment, after demonstrating its justice, would be a useless task. Every mind that has investigated the causes and progress of crime, must acknowledge the one, every benevolent heart must feel the other. And even economy, cold, calculating economy, after stating the account in dollars and cents, must confess that this is a money-saving institution. If it is wise to prevent a hundred atrocious crimes by removing the opprobrium of a venial fault, and substituting instruction for punishment; if it is the highest species of humanity to relieve from the misery of vice and the degradation of crime, to extend the operation of charity to the mind, and to snatch with its angel arm innocence from seduction, if it be a saving to society to support an infant for a few years at school, and thereby avoid the charge of the depredations of a felon for the rest of his life (*a*), and

(*a*) There is hardly a child who will be condemned to it (the New York House of Refuge), who, if left to the course which would bring him to it, would not finally be supported by the state as a convict. The evidence of this is, that a very large proportion who are now confined in our state prisons, commenced their career in crimes when they were children, in some of our large cities. One person in particular, who is now confined in the prison at Auburn, was first convicted when he was only ten years old, and has since been, at different times, twenty-eight years a convict, supported by the state, at an expense of not less than two thousand dollars.—*Report of the New York Committee.*

In the Arch street prison at Philadelphia there is now awaiting his trial, for felony, a boy of eleven years of age, who already passed a year in the penitentiary of New Jersey for horse stealing: during this period the only lessons he received, were the details given by his fellow convicts of their exploits; some of which he repeated to us, with a satisfaction all unexpressed. I cannot avoid adding to this note an extract from a report on the state of the French prisons made by Mr. Dussart, which contains the account of a complete conversion of a young man, who was in the same prison as the boy now awaiting trial.

the expense of his future convictions and confinements ; then is the School of Reform—a wise, a humane, and an improved institution.

I need not enlarge this report by the details for the government of this school ; they are minutely contained in the code. One principle pervades the whole, which has been sufficiently enlarged upon : that the offences of children may be sufficiently corrected, both for the ends of punishment and example, by education and employment. If this be wrong, the whole plan must be remodelled ; but, in establishing it, I have been guided by something better than the best reasoning. In the city of New York there is an establishment of this kind, which can never be visited but with unmixed emotions of the highest intellectual pleasure. It now contains one hundred and twenty five boys and twenty-nine girls, for the most part healthy, cheerful, intelligent, industrious, orderly, and obedient ; animated with the certain prospect of becoming useful members of society, who, but for this establishment, would still have been suffering under the accumulated evils attendant on poverty, ignorance, and the lowest depravity, with no other futurity before them than the penitentiary or the gallows. I ought not to omit mentioning here, that the female department is superintended by a visiting committee of ladies, who, at regular and frequent periods, examine the school, converse with the scholars, encourage the

several youths, who had been sentenced to imprisonment by the correctional tribunal, together with men of different ages, and also a man condemned to death for murder : he requested to speak to me in private ; “ I wait,” said he, “ the moment of execution ; and since you are the first person who has visited us, I wish to address you with confidence, and to conceal nothing from you. I am guilty of the crime for which I have been condemned ; I have committed robbery and murder. From my infancy my parents neglected me. I fell into bad company ; my undoing was completed in a prison ; and I am now about to expiate all my faults. Among the persons whom you see in this room there are some youths, who, with pain I observe, are preparing themselves for the commission of new crimes, as soon as their term of confinement expires. If you could get them separated into a separate room, this, sir, would be the greatest benefit that you could confer upon them.”

It will be observed that, contrary to the rules laid down for the penitentiary, personal castigation is permitted in the school. This exception was introduced because the infliction of that punishment in childhood is not attended with the degradation which characterizes it when applied to adults; because it is permitted to

instinctive principle. Thus he continued until the establishment of this institution. He fortunately became one its first inmates. Upon his introduction he evinced a settled determination to escape (in which he succeeded several times.) The most rigid treatment was for a long time successfully applied. At length he began gradually to yield to the restraints, and submit to the regulations required of him; from January to December 1826, he so far improved that we considered him one of the most amiable boys in the house; the person who contracted for his services, said, that his attention to his work was such as to afford him much pleasure, that he was entirely obedient, agreeable, and active in the discharge of his duties. Conceiving that the object of the institution, in the effect of his reformation, was completed, and that a better state of mind could not be effected in William, he was indentured to a highly respectable mechanic, living in Connecticut. Some time previous to his indenture, he was asked whether he would ever redarken his character by the commission of crime, if selected to be bound out, his reply was, that he was then influenced by the *wicked one*, but that he now felt his mind to be in a different channel, and if a modest and humble deportment for several months, together with a knowledge of his frequently practising devotional exercise, are proper criterions by which to judge, we feel perfectly safe in saying that William was truly an altered boy. Since his indenture, a very favourable report has been received from him.

S. T.—Aged sixteen years, born in Patterson, N. J., he lost his father and mother when quite young, after which he was left to the care of guardians, who neglected him. He in a short time acquired a degree of celebrity among his companions, by his skill in stealing old rope, iron, copper, &c. from around the docks. His career, however, was made short by the superintending care of the city authority, by whom he was committed to the alms house, as a vagrant. He twice escaped from that institution, and when retaken the second time, he was sent here. Soon after his commitment it became evident that the discipline of the house was all that was requisite to make him obedient. After conducting himself to the entire satisfaction of the superintendent, he was indentured to a farmer in the country. Since his indenture, we have been informed by the gentleman with whom he lives, that “he is industrious, attentive and kind; and such is the state of his mind, as relates to religion and morality, that he will reprove his men for using profane language, in a prompt, though modest and becoming manner, often referring to the precepts he received from his recent friends.”

teachers, with respect to their scholars: to master the respects apprentices; and because the rules laid down for regulating the punishment are such as will effectually prevent its abuse. Yet, if experience should prove, as I think it will, that, even in these cases, it may be dispensed with, it ought to be abolished. But, while the power is granted by law to the master over the scholar

D. B. L.—Aged fifteen years, born in New York, committed to the police, on suspicion of having stolen a shawl. He was brought up in the vicinity of Banker street, and for some months played the game in those receptacles of vice and misery, the dancing houses of the Hook. He acknowledges having stolen some few articles, but denies stealing the article for which he was sent here. From the time he was committed until his discharge he conducted himself in an entirely proper manner. In October he was indentured to a respectable gentleman residing about sixty miles north of this city.

L. S.—Aged about sixteen years, born in Ireland, his parents emigrated to this country about eight years ago. His father has since died. His education was entirely neglected by his parents, and the children of his companions left exclusively to himself. He has worked at several mechanical branches of business, to none of which his restless disposition could attach itself. He was committed to the Refuge in March, 1825, from the police office, for stealing a copper kettle, for which he had been confined in Bridewell eight days, where he had been four times before. The character of a notorious thief cannot with justice be attached to this boy, though he had been a habitual pilferer for several years. Upon his entry into the house, he gave no evidence of a disposition palpably wicked, yet he was a source of much trouble to the superintendent; in mischief he was almost invariably first, to the rules and regulations of the house he was perfectly indifferent, and in one instance he absconded. After a few days he was returned, severely punished, and put in irons for forty-three days, when his irons were taken off. In December his improvement was so great that he was promoted to the situation of night watch, and day guard, the duties of which he faithfully performed until July 1826, when he requested to be sent to sea, his request was complied with, and he was indentured to a highly respectable shipowner of this city. After an absence of three months, he returned to the Refuge on a visit, stated that he was perfectly contented with his situation, and that he had often reflected while at sea, that, instead of enjoying the blessings of liberty, he might have now been in the state prison, had it not been for the establishment of a House of Refuge.

D. S.—Aged fifteen years, born in New York; his father died while he was yet an infant; his mother since married an oysterman, now living in the vicinity of Banker street. David has lived with three different persons, who kept oyster cellars; after leaving them, he returned to his

or apprentice, it would not be prudent to deny it to the warden, who acts in this capacity towards the children under his care.

There is also another difference that will be remarked, in comparing this institution with the penitentiary. Here public worship is directed, while, in the penitentiary, no provision is made for its performance. The advantage to be derived from an habitual attendance on this duty is so great, that it ought not lightly to be given up ; but, after the best reflection I could give to the subject,

mother. He commenced his thefts by stealing wood from about the docks ; has also been in the habit of stealing old junk, copper, &c. He has been three several times committed to Bridewell, the last time for stealing a copper kettle, in company with the foregoing boy ; it was for this offence that he was committed to the Refuge. He was at first very refractory, constantly plotting how to escape, and endeavouring to persuade others to accompany him. He was for some months treated with much strictness, from June 1825 to February 1826, his conduct was entirely satisfactory ; at this time an opportunity offering to give him an advantageous situation, it was deemed incompatible with the object of the institution to detain him longer. He was consequently indentured to a gentleman residing in the western part of this state, who, in a letter directed to his mother, two months after the date of his indenture, says he has much reason to be pleased with David's conduct.

J. D. S.—Aged eleven and a half years, born in New York. This child, notwithstanding his extreme youth, has committed many errors. He was first led to the perpetration of crime by the persuasion of one older than himself, in whose company he stole many articles ; he was once in Bridewell for stealing, and was frequently punished by his parents, but to no effect. He was committed here, at the solicitation of his father, in April 1825. He conducted himself with uniform propriety until October 1826, when he was returned to his parents for the purpose of indenturing to a gentleman who was instrumental in his reformation, and who was well acquainted with his disposition. Here is another instance in which the preservation of a child from ruin may be attributed to the establishment of a House of Refuge. Had this boy's thieving practices been permitted to degenerate into a habit, they doubtless would have procured for him a residence in our state prison or penitentiary, where the object is punishment, and not reformation ; he must have been thrown in the company of old and hardened offenders, the contaminating influence of whose conversation would eventually have banished every virtuous and generous sentiment from his tender bosom. What reflecting mind but must admit the utility of such an institution, and what generous soul but would contribute to its support ?

I determined that the school, but could not the penitentiary. In order in the workshop, and in the chapel, during divine service, and conversing with one another, and association in the church on Sunday by the children, the means of escape, or other unlawful combination, instituted for the purpose of all the convicts on Sunday, consistent with the first principle of the institution, not be preserved without a moderate chastisement; the convicts would be deprived of their periodical reunion, not to hasten to the religion, but to enjoy the society of which they are deprived; the utmost vigilance could not prevent communication by whispers or signs, they would be acquainted with each other's faces, and be ready to renew, after discharge, those associations which it is an object of the plan to prevent; and it has been ascertained, and I believe with truth, that most of the combinations for insurrection and escape have been formed in the chapel.

In all these institutions, whether for restraint, punishment or education, so much must depend on the integrity, attention and ability, of the warden, that not only are the greatest care and judgment necessary in selecting him, but the most watchful superintendence after he is chosen.

It may be stated as a general rule, to which, unhappily, there are few exceptions, that, if neglect in the performance of official duties incurs no loss of emolument, they will be neglected, unless the state of public opinion is such as to make it an essential condition, that neglect is a crime, and that the offender should be punished upon it.

will not its duty, enforce a performance of the duty; and a man of high character will be attended with any great reverence by the eyes of others. But, in framing laws, we must rely on the constant operation of this high sense of duty, and not on public approbation. They must be such as men will do, and unfortunately the disposition of men is much as possible, with as little trouble as possible, to do that which we shall find most general, and which therefore, we must counteract, or direct to our purpose, if we expect our institutions to be useful and efficient. A superintending power, therefore, has, in our laws, been provided to secure the execution of official duty; this is easily done, and were the remedy an effectual one, nothing could be more simple than the branch of legislation; but what can assure us that the supervisors will do their duty?

*On the system, *quis custodiet*?*

From legislation, we may create a system of successive responsibilities and inspections; but a foundation must be laid for the last. We may place the weight on the elephant, and support him by the tortoise, but here our theory, with that of the Indian cosmogonist, ends. Sound philosophy alone can, in both cases, direct us to the great principles which effect the different ends, without this cumbrous and useless machinery. Individual interest draws all to a central point; a desire to promote the public good, enforced by the fear of censure and the hope of applause, gives an impetus in a different direction; and these powers combined, will restrain aberrations from the circle of official duty just as the order of the heavenly bodies is preserved by the divergent operation of mutual attraction and the projectile force.

Self-interest, then, must be so combined with the public good, as to make them inseparable; and public inspection must be secured, to keep this great spring of human action in its proper direction. This has been ~~endeavoured~~ **endeavoured** in the plan of administration for the several ~~houses~~ **houses** of confinement provided for by this system.

The whole are placed under the close and constant care of the same board, before being passed to the inspectors, its general principles could only be discussed by a common head. The number of the institution required an attention that a single person could not well perform; a board of inspection, therefore, was created, and, considering the nature of the duties, the number of five was fixed on as that which would best unite the advantages of deliberation with the requisite despatch of business; and a distribution of the duties into classes, that some might be performed by one member, making two necessary for others, and a majority for those which were most important, was considered as a convenient and safe arrangement. This board, in addition to its general superintending power, has the direct management of all the pecuniary concerns of the several prisons, but under regulations, which it is thought must prevent the possibility of any corrupt appropriation or negligent dilapidation of the funds. Among other precautions, is one that ought, I think, to be adopted in all cases of trust, whether arising from office, or contract, or testamentary disposition; the deposit of all monies held for another, or for the public or any institution, in a safe public bank, in the name of the trust, or of the person in his quality as officer or agent, to be drawn out only by checks, expressing the purpose to which the money is to be applied, and making it a criminal breach of trust if the deposit is not made, or if the funds are drawn for any other purpose than that of the person or institution for whose use it was received. The advantages of such an arrangement in commercial agencies, and public and private trusts, need not be described on here. It is intended in connexion with other provisions, prohibiting any kind of concern in purchases by contractors for the prison, any profit or convenience to be derived from the prisoners, to take away all opportunity of making the office a pecuniary speculation, and to secure the most efficient management of the

are arduous ; they require experience as well as diligence ; the undivided attention of the members must be given to the subject ; the close and unremitting labours required by the important business entrusted to them, cannot be expected to be gratuitously given. Few men, in our state of society, can afford to divert the time required for this purpose from their private affairs ; and those who can afford it, are not always the best fitted for the task. They must, therefore, be paid, and so liberally paid, as to command the talent and integrity required. Philanthropy, public spirit, humanity or religion, may inspire individuals to volunteer services ; but it is a natural tendency of zeal gradually to cool, when the service which excited it is one requiring patient attention, a daily intercourse with the most degraded of our species, and a close attention to dull detail, more especially when it requires no exertion of those talents that command public applause : besides this, if the service is unpaid, its negligent performance rarely incurs the penalty of public censure, which never falls very heavily on those who have gratuitously given any part of their time or attention to the business ; whereas, the salary being an equivalent for the service, legal punishment, as well as loss of reputation, will generally attend neglect. The particular powers given to the board of inspectors, need not be here detailed ; they are, it is thought, clearly designated in the text. As theirs is chiefly a supervising power, and not so direct an agency upon the prisoners as that of the other officers, it was not deemed necessary to give them any interest in the labour of the convicts ; the number, too, of their members would have rendered this extremely onerous to the institution. But with the warden it was different ; to him it was deemed necessary to apply those principles I have endeavoured to establish, which make the interest of the officer and of the public to coincide. The interest of the public is, first, that all the regulations in the code, for punishment and reformation, should be strictly observed ; secondly, that as much as possible of the expense of the institution should be paid by the labour of the convicts.

To give the warden an interest in the labour of the prisoners, a premium on the decrease of mortality will be offered. The system of testing the efficiency of the various departments will be continued, in promoting the industry and skill of the prisoners. The warden has a percentage on the gross amount of the labour performed, while the superintendence of the manufacturing department will be the examination of the prisoners, and of the results of their labour. The observation of the chaplain and physicians, and of the reports of the official visitors, will effectually prevent the use of any other means of labour by any other means, or in any other way than that which is prescribed by the code. It is also to be expected that the health of the prisoners, the preservation of the health of the prisoners, the preservation of the health of the prisoners should not be carried further than is necessary for the purpose of the sentence; for this purpose, cleanliness, wholesome food, exercise and proper relaxation from labour, are provided. To enforce their execution, the proper system of discipline is provided; and to combine private interest and the love of distinction in the performance of this duty, various and useful premiums are given for different grades of decrease in the usual mortality of the prisoners. These rewards are extended to all the officers whose agency can at all contribute to the end.

It may be necessary, before the conclusion of the report, to give some idea of the number of officers, and the duties of those which have not yet been mentioned.

The plan, as has been seen, comprehends,

A House of Detention, with two departments;

A Penitentiary;

A School of Reform;

A House of Refuge and Industry, with two departments.

All of these are under the general superintendence of the inspectors; one warden and one matron will be required for each institution. One chaplain and one physician will be sufficient for the four; a clerk for the House of Detention, one teacher for the School of Reform and one for the Penitentiary. In the other institutions, the number of officers will be enough to require a regular

to be found competent for this purpose; so that, independent of the underkeepers, the number of which is dependent on some measure, on that of the prisoners, the four institutions will require thirteen officers. The manner in which the prisoners are proposed to be confined, will preclude the necessity of a military guard; and unless the numbers shall multiply much beyond our hopes and reasonable expectations, one underkeeper for the House of Detention, one for the School of Reform, two for the House of Industry, and six for the Penitentiary, ten only in all, will be required. In this calculation neither the inspectors nor their agent are included.

A regulation of much importance in the code may need some explanation, which has not been given in its place. Solitary confinement, although accompanied by the permission to labour in an uncovered court, may, if the labour be sedentary, be injurious to the health. To counteract this effect, a machine is directed to be made that will require strong muscular power to put in motion, and at this, each of the male prisoners is directed to work, but only for one hour in each day. This is made compulsory; but as the only penalty is solitary confinement to the cell, and as it is considered and intended only as a preservation to the health, this compulsion is not at war with the principles before laid down on that subject. The prisoners are to be brought to the machine separately and it must be so contrived as not to permit them to see or hear each other while at work. Its effects will be not only to preserve general health, but to fortify the muscular powers, and fit the convict on his discharge for any species of laborious employment.

The tread-mill, although a favourite engine of punishment in many institutions, finds no place in this, for the following reasons: it cannot be employed without breaking in upon the system of solitary confinement, which is the basis of the system; its injurious effects upon the health are supported by strong testimony (a), and although

(a) See John Doe Hippel's on the tread-mill.

there is a contrariety of evidence on the subject (*b*), yet it may be fairly inferred from the whole, that it does not fortify the constitution and prepare the convict for any of the ordinary pursuits of laborious life, the principal muscular action being in the legs only. It teaches the convict nothing that can be useful to him on his discharge. It is not a profitable employment of human power. If it have any effect on the morals, it must be a bad one, from the associations inseparable from it, and from the degradation which is considered to be attached to it. As a punishment it must be unequal; to give it the velocity necessary to punish one of a robust constitution, would make it a torture to a weaker convict.

The Code of Reform and Prison Discipline, and the reasoning in support of its provisions, are now before the legislature; their wisdom will determine on the propriety of its adoption. Many parts of the plan have at different times been proposed, and some of them have been partially executed, but they have never before been consolidated and presented as component parts of a whole system; a characteristic which it is thought constitutes its chief value: for it must be apparent, from the nature of the subject, that, without a continuity of operation, as well as uniformity of principle in the plan, no infliction of punishment or discipline for reformation can have any great effect. In all legislation we must first form a clear idea of that which we wish to accomplish, and then determine on the best means of effecting it. These being well understood, they must be explicitly enounced, not only for our own guidance in forming the plan, but for that of our successors in correcting, of the judges in expounding, and of our constituents in obeying it. In that which I offer, this great object has been constantly kept in view, and has been repeated perhaps oftener than was necessary; and the means proposed to effect it are such only as have been recommended either by experience or the matured reflection

tion. But, as this object is the prevention of crime, it is clear that this would be but imperfectly effected by any discipline applied after conviction only. Conviction supposes the prior existence of crime, and the discipline that corrects it is punishment; but punishment is only one of the means of attaining the end of preventing crimes: to avoid their commission, therefore, we must go one step further back; we must prevent contaminating association before trial, more carefully than we would after it; we must never confound innocence with unconvicted guilt, by imposing any unnecessary restraint upon either. But even accusation is most commonly founded on the evident commission of an offence, although trial is necessary to designate the offenders. We must begin, then, at an earlier stage in our efforts to prevent it; we must relieve that extreme want which is sometimes the cause, and oftener the pretence for crime; and we must find employment for the idleness which generally produces it. And when this is done, our work is not yet complete; religious, moral, and scientific instruction must be not only provided but enforced, in order to stamp on the minds of the people that character, that public feeling, and those manners, without which laws are but vain restraints.

The recapitulation of the several institutions embraced by the Code of Reform and Prison Discipline, has been made to show their close connexion, and that each part is so necessary to carry into effect the great objects of the system, that an omission of any one would, in a great measure, defeat the good effect that might be expected from the others. If we mean to guard the community from the inroads of crime, every avenue must be defended. A besieged city, fortified on one side, leaving the others open to hostile attacks, would be a just image of a country in which laws are made to eradicate offences by punishments only, while they invite them by neglect of education, by the toleration of mendicancy, idleness, vagrancy, and the corrupting associations of the accused before trial as well as after conviction. Yet such is the lamentable state of criminal jurisprudence, that all nations are more

or less in this state. Here great sums are expended to punish offenders, but no means are provided to prevent them: there mild punishments and reformatory measures are applied after judgment, but severe punishments and contaminating associations are not removed from the innocent and on the guilty. Between some states the contest seems to be for the greatest revenue from the labour of the convict; in others the object is to degrade and make the convict a misery. No where has a system been introduced consisting of a connected series of institutions based on the same principle of uniformity, directed to the same end. In no where is criminal jurisprudence treated as a science, what goes by that name, consists of a collection of rules, similar, unconnected, sometimes conflicting, to punish different offences as they happen to present themselves. Experiments directed by no principle, to try the effect of different penalties; of permanent laws to remedy temporary evils; of discretionary power, supported by the blindest confidence vested in the judge, and at others with the most criminal negligence given to an officer of executive justice. All these and other incongruities would cease, were the lawgiver to form correct principles; enounce them for his own guidance and that of his successors; and, with them constantly before his eyes, arrange his system of criminal jurisprudence into its natural divisions, by providing for the poor, employing the idle, educating the ignorant, defining offences and designating their correspondent punishment, regulating the mode of procedure for preventing crimes and prosecuting offenders, and giving precise rules for the government and discipline of prisons.

With such a system it may reasonably be expected, not that offences will be eradicated, but that their recurrence will be much less frequent, and that the rare offences will be witnessed of a retrograde movement in the criminal mind. But the desultory attempts which have

the new system; they are troublesome, and the false promise that is placed upon them excites high expectations, which are disappointed, because no disease pervading the system can be cured by topical remedies, and the disappointment produces despair of final success, an abandonment of the plan of reformation, and an inclination to return to the old sanguinary system.

The code now submitted completes the System of Penal Discipline, which is respectfully offered for consideration. The work was undertaken with an unfeigned distrust of human power, which *nothing could have conquered but the conviction that a simple enumeration and development of the principles on which the system is founded would bring about a conviction of their truth.*

It has been prosecuted with laborious and unremitted application for several years, with a respectful attention to the opinions of others, and a close observation of practical results.

The execution was attended with the gratifying consciousness of having taken every precaution to guard against the peril of opinion, and neglected no means that could be suggested by the deepest sense of its importance, and a religious desire that it might advance private happiness, by establishing the true principles of public justice.

It is now respectfully offered for consideration, in the hope that after legislative wisdom shall have supplied the omissions, and corrected the errors of the work, it may be made the basis of a system, by which instruction may be promoted, idleness and vice repressed, crimes diminished, and the sum of human happiness increased.

EDWARD LIVINGSTON.

